# DOCKET

No. 09-5327 *** CAPITAL CASE ***

Title: Albert Holland, Petitioner

v.

Florida

Docketed: July 16, 2009

Lower Ct: United States Court of Appeals for the Eleventh Circuit

Case Nos.: (07-13366)

Decision Date: August 18, 2008

Rehearing Denied: January 13, 2009

Questions Presented

| Date | Proceedings and Orders |
|---|---|
| Apr 1 2009 | Application (08A880) to extend the time to file a petition for a writ of certiorari from April 13, 2009 to May 13, 2009, submitted to Justice Thomas. |
| Apr 13 2009 | Application (08A880) granted by Justice Thomas extending the time to file until May 13, 2009. |
| May 13 2009 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 17, 2009) |
| Aug 11 2009 | Order extending time to file response to petition to and including September 14, 2009. |
| Sep 11 2009 | Brief of respondent Florida in opposition filed. |
| Sep 24 2009 | DISTRIBUTED for Conference of October 9, 2009. |
| Oct 13 2009 | Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. |
| Oct 26 2009 | Motion to appoint counsel filed by petitioner Albert Holland. |
| Nov 13 2009 | The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 16, 2009. |
| Nov 17 2009 | Motion DISTRIBUTED for Conference of December 4, 2009. |
| Nov 30 2009 | SET FOR ARGUMENT ON Monday, March 1, 2010. |
| Dec 3 2009 | The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including December 23, 2009. |
| Dec 7 2009 | Motion to appoint counsel filed by petitioner GRANTED. Todd G. Scher, Esquire, of Miami Beach, Florida, is appointed to serve as counsel for the petitioner in this case. |
| Dec 23 2009 | Joint appendix filed (Volume I and II). (Statement of costs received) |
| Dec 23 2009 | Brief of petitioner Albert Holland filed. |
| Dec 28 2009 | Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed) |
| Dec 30 2009 | Brief amici curiae of Legal Ethics Professors and Practitioners, et al. filed. |
| Dec 30 2009 | Brief amici curiae of Eleven Legal Historians filed. (Distributed) |
| Jan 4 2010 | CIRCULATED. |
| Jan 15 2010 | Record received from U.S.D.C. for Southern District of Florida. (4 boxes) |
| Jan 15 2010 | Record received from U.S.C.A. for 11th Circuit. (1 envelope) |
| Jan 22 2010 | Brief of respondent Florida filed. (Distributed) |
| Jan 29 2010 | Brief amici curiae of Texas, et al. filed. (Distributed) |
| Jan 29 2010 | Brief amicus curiae of Criminal Justice Foundation filed. (Distributed) |
| Feb 22 2010 | Reply of petitioner Albert Holland filed. (Distributed) |
| Mar 1 2010 | Argued. For petitioner: Todd G. Scher, Miami Beach , Fla. (Appointed by this Court.) For |

respondent: Scott D. Makar. Solicitor General, Tallahassee, Fla.

# PETITION FOR WRIT OF CERTIORARI

09-5327

Supreme Court, U.S.
FILED
MAY 13 2009
OFFICE OF THE CLERK

**DOCKET NO. _____**

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2008**

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**ALBERT HOLLAND,**

**Petitioner,**

**vs.**

**STATE OF FLORIDA,**

**Respondent.**

---

## APPLICATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

**COMES NOW THE PETITIONER, ALBERT HOLLAND,** by and through his undersigned counsel, and herein moves for leave to proceed *in forma pauperis*. In support thereof, Petitioner would state:

1. Petitioner is an indigent death-sentenced inmate in the State of Florida.
2. On this date, Petitioner is filing a Petition for A Writ of Certiorari to the Eleventh Circuit Court of Appeals.
3. Petitioner, who is without funds, seeks leave to proceed in this matter *in forma pauperis*.
4. The undersigned counsel was appointed by the United States District Court for the

ORIGINAL

Southern District of Florida, and by the Eleventh Circuit Court of Appeals, pursuant to the Criminal Justice Act.

WHEREFORE, Petitioner moves to proceed *in forma pauperis*.

Respectfully submitted,

TODD G. SCHER
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Attorney for Petitioner-Appellant

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing motion has been furnished by U.S. Mail to Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, on this 13th day of May, 2009.

TODD G. SCHER
Counsel for Petitioner

09-532

SUPREME COURT, U.S.
FILED
MAY 13 2009
OFFICE OF THE CLERK

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

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ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED--CAPITAL CASE

In determining that Petitioner was not entitled to equitable tolling to excuse the late filing of his habeas petition, the Eleventh Circuit determined that the reason for the late filing was the "gross negligence" on part of Petitioner's state-appointed collateral attorney's failure to file the petition in a timely fashion despite repeated instructions from the Petitioner to do so. However, under the new test announced by the Eleventh Circuit in Petitioner's case, *no* allegation of attorney negligence or failure to meet a lawyer's standard of care, in the absence of bad faith, dishonesty, divided loyalty, or mental impairment, could *ever* qualify as an exceptional circumstance warranting equitable tolling.

This Court should grant *certiorari* to the Eleventh Circuit to determine whether "gross negligence" by collateral counsel, which directly results in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling, or whether, in conflict with other circuits, the Eleventh Circuit was proper in determining that factors beyond "gross negligence" must be established before an extraordinary circumstance can be found that would warrant equitable tolling.

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2008**

---

**ALBERT HOLLAND,**

**Petitioner,**

**vs.**

**STATE OF FLORIDA,**

**Respondent.**

---

Petitioner, Albert Holland, respectfully petitions this Court for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

## CITATION TO OPINION BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit in this cause is reported as *Holland v. Florida*, 539 F. 3d 1334 (11th Cir. 2008), and is attached hereto as Attachment A. A timely petition for rehearing and rehearing *en banc* was denied on January 13, 2009 (Attachment B). An extension of time to file the instant petition was granted by Justice Thomas up to and including April 13, 2008. This petition is timely filed.

## STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244 (d) provides:

> (1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in state custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

## PROCEDURAL HISTORY

### A. Trial/Direct Appeal Proceedings.

Petitioner was indicted on or about August 16, 1990, in Broward County, Florida, on four counts, including first-degree premeditated murder. He pled not guilty and, after a jury trial, was convicted and sentenced to death for the first-degree murder count, life imprisonment for sexual battery, forty (40) years for attempted first-degree murder, and seventeen (17) years imprisonment for armed robbery. On direct appeal, however, the Florida Supreme Court reversed and remanded for a new trial. *Holland v. State*, 636 So. 2d 1289 (Fla. 1994).

On retrial, Petitioner was again found guilty,[1] and, at a penalty phase, the jury recommended a sentence of death by a vote of eight (8) to four (4). He was thereafter sentenced to death on the first-degree murder count, life imprisonment on the armed robbery count, fifteen (15) years imprisonment on the attempted sexual batter count, and thirty (30) years on the attempted first-degree murder count. On direct appeal, the Florida Supreme Court affirmed the judgments of conviction and sentences, including the sentence of death. *Holland v. State*, 773 So. 2d 1065 (Fla. 2000). *Certiorari* review was denied on October 1, 2001. *Holland v. Florida*, 534 U.S. 834 (2001).

### B. State Postconviction Proceedings.

On October 1, 2001, pursuant to state procedures, *see* Fla. R. Crim. P. 3.851

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[1]However, at the retrial, Petitionerwas found guilty of the lesser offense attempted sexual battery, rather than sexual battery as alleged in Count 3 of the indictment.

(b), the Florida Supreme Court assigned the Office of the Capital Collateral Regional Counsel–South [CCRC-South] to represent Petitionerfor purposes of his collateral representation. However, CCRC-South moved to withdraw and, on November 2, 2001, the state circuit court appointed attorney Bradley Collins to represent Petitioner pursuant to the "registry" list of attorneys. Following the discovery process permitted under Fla. R. Crim. P. 3.852, *see generally* DE16 at 3-4, Petitioner, through Mr. Collins, filed his motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 on or about September 17, 2002. The motion was ultimately denied by the state circuit court and affirmed by the Florida Supreme Court on November 10, 2005. *Holland v. State*, 916 So. 2d 750 (Fla. 2005). No motion for rehearing was filed by Mr. Collins and, as a result, the mandate issued from the Florida Supreme Court on December 1, 2005.[2] Mr. Collins never informed Petitioner that his appeal had been denied by the Florida Supreme Court nor that the mandate had issued, thus triggering the time in which a timely petition for writ of habeas corpus needed to be filed.

Petitioner thereafter filed a *pro se* petition for writ of habeas corpus (DE1).[3] Petitioner thereafter moved the court to discharge attorney Collins and to appoint new counsel (DE6). After ordering both the Respondent and Collins to file

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[2]Mr. Collins, on behalf of Petitioner, did file a petition for *certiorari* review in this Court on February 8, 2006, a petition which was denied on April 17, 2006. *Holland v. Florida*, 126 S.Ct. 1790 (2006).

[3]The circumstances leading up to the filing of Petitioner's *pro se* petition are fully discussed in the section of this Petition discussing the reasons that the writ should be granted in this case.

responses to Petitioner's motion, and after reviewing these responses, the court ultimately entered an order appointing the undersigned counsel to represent Petitioner (DE22). The Petitioner, through undersigned counsel, thereafter filed a consolidated pleading (with an extensive appendix) in which he alleged his entitlement to equitable tolling and to an evidentiary hearing (DE35, 38). The Respondent filed a sur-reply (accompanied by an appendix) in which it contended that Petitioner was not entitled to equitable tolling (DE41). On April 27, 2007, the district court entered an order dismissing Petitioner's §2254 petition as untimely, concluding that equitable tolling was not warranted (DE46). A motion to alter or amend judgment, and supplement thereto, was filed; following a response by the Respondent (DE49), the court denied the motion (DE52). A timely notice of appeal was filed (DE53), and the district court granted a COA on the issue of whether the Petitioner was entitled to equitable tolling (DE60).

On August 18, 2008, the Eleventh Circuit affirmed the district court's dismissal of Petitioner's habeas corpus proceeding. Declining to conclude that Petitioner was not diligent in his efforts, the Eleventh Circuit focused instead on whether the acts of Petitioner's state collateral counsel were sufficient to constitute an "extraordinary circumstance" sufficient to warrant equitable tolling. Recognizing that attorney misconduct going beyond "mere negligence" could constitute an extraordinary circumstance warranting equitable tolling (Attachment

A at 8) (citing *Downs v. McNeil*, 529 F. 3d 1311 (11th Cir. 2008),[4] and that Petitioner's state collateral counsel acted in a "grossly negligent" manner in his representation of Petitioner and his failure to file a federal habeas petition "despite repeated instructions to do so," (Attachment A at 9), the Eleventh Circuit concluded that

> no allegation of lawyer negligence or of failure to meet a lawyer's standard of care–in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part–can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough. This is pure-professional-negligence case. . . .

(Attachment A at 9-10).

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[4]*Downs* had issued while Petitioner's case was pending before the Eleventh Circuit and shortly before Petitioner's appeal was disposed of by that Court.

## REASONS FOR GRANTING THE WRIT

**CERTIORARI SHOULD BE GRANTED TO ADDRESS THE APPROPRIATE STANDARD FOR EQUITABLE TOLLING WHEN LATE FILING OF A HABEAS PETITIONER IS DUE TO THE "GROSS NEGLIGENCE" OF STATE COLLATERAL COUNSEL , AND WHETHER THE "GROSS NEGLIGENCE" OF STATE COLLATERAL COUNSEL CAN CONSTITUTE AN EXTRAORDINARY CIRCUMSTANCE SUCH THAT EQUITABLE TOLLING IS APPROPRIATE TO EXCUSE A LATE PETITION.**

In affirming the dismissal of Petitioner's habeas corpus petition as untimely, the Eleventh Circuit set out a bright-line standard for determining under what circumstances the actions of a state collateral lawyer's actions, or inactions, can rise to the level of an "extraordinary circumstance" such that a habeas petitioner's late filing can be excused under the doctrine of equitable tolling. In Petitioner's case, the Eleventh Circuit found that Petitioner's state collateral counsel acted in a "grossly negligent" manner in his "failure to file a federal habeas petition timely, despite repeated instructions to do so" (Attachment A at 9). However, despite finding that counsel had acted in a "grossly negligent" manner, the Eleventh Circuit condoned his behavior by concluding that "no allegation of lawyer negligence or of failure to meet a lawyer's standard of care–in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part– can rise to the level of egregious misconduct that would entitle Petitioner to equitable tolling" (Attachment A at 9-10). The Eleventh Circuit's stubborn refusal to acknowledge that "gross negligence" is sufficient to warrant equitable tolling is in conflict with the holdings of other

circuits and is a near-impossible standard to meet. If the late filing is due to the "gross negligence" of state collateral counsel, as it was in the instant case, Petitioner submits that an exceptional circumstance has been established and that equitable tolling is warranted.

Despite the State of Florida's promise to Petitioner that he have counsel to competently and effectively represent him in both his state and federal postconviction litigation, a promise that would be purportedly enforced by judicial monitoring,[5] Petitioner's state collateral attorney, Mr. Collins, failed to timely file a §2254 petition on behalf of Petitioner.[6] Petitioner, *pro se*, filed a habeas corpus

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[5]When Florida created the registry system, it took the important step of creating an affirmative obligation for the state courts to monitor registry counsel. Fla. Stat. §27.11(12) reads:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, *or the failure to file appropriate motions in a timely manner*.

(emphasis added). The Florida Supreme Court has also held that because state collateral counsel are appointed by operation of statute, such representation must be effective in order to give any meaning to the statutory provision. *See Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988).

[6]When Mr. Collins was appointed to represent Petitioner, he was contractually bound by the mandates of Fla. Stat. §27.711(2) (2005), which provides:

> After appointment by the trial court under s. 27.710, the attorney must

petition pursuant to 28 U.S.C. §2254, on January 19, 2006.[7] In the district court and the Eleventh Circuit, Respondent argued that Petitioner's petition was filed thirty-eight (38) days beyond the one-year statute of limitations set forth in 28 U.S.C. §2244 (d)(1) (DE14 at 10 *et. seq.*). In light of the late filing, Petitioner acknowledged the late filing but urged that he was entitled to equitable tolling for a number of reasons.

Equitable tolling of the AEDPA statute of limitations for filing a federal habeas corpus petition set forth in 28 U.S.C. §2244(d)(1) is appropriate where: (1) the petitioner has been prevented from asserting his rights in some extraordinary way, and (2) the petitioner has exercised reasonable diligence. *See, e.g. Merritt v. Blaine*, 326 F. 3d 157, 168 (3d Cir. 2003); *Sandvik v. United States*, 177 F. 3d 1269, 1271 (11th Cir. 1999); *Marsh v. Soares*, 223 F. 3d 1217, 1220 (10th Cir. 2000). As the Eleventh Circuit has explained, equitable tolling is available to a habeas petitioner who "untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik*, 177 F. 3d at 1271. *Accord Steed v. Head*, 219 F. 3d 1298, 1300 (11th Cir. 2000).

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> immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant throughout all postconviction capital collateral proceedings, *including federal habeas corpus proceedings*, in accordance with this section or until released by order of the trial court.

(emphasis added).

[7] The State of Florida acknowledged in the district court litigation that January 16, 2006, the date that Petitioner signed the petition, was the "filing" date due to the "mailbox rule" applicable to a prisoner filing (DE14 at 12 n.4).

While equitable tolling is an "extraordinary remedy" to be applied "sparingly," *id.*, it is nonetheless a remedy that can be applied when a court finds that a petitioner has made a sufficient showing of both extraordinary circumstances and diligence. *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005). Although equitable tolling is not appropriate in cases of "garden variety excusable neglect," *Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990), it should be evaluated on a case-by-case basis and granted upon the establishment of a "unique, specific set of facts." *Browning v. AT&T Paradyne*, 120 Fl. 3d 222, 227 (11th Cir. 1997). *See also Arthur v. Allen*, 452 F. 3d 1234, 1253 (11th Cir. 2006) ("A determination as to whether rare and exceptional circumstances are presented requires the examination of the facts in each case") (citing *Knight v. Schofield*, 292 F. 3d 709, 711 (11th Cir. 2002)). The "focus" of the inquiry is on the circumstances surrounding the late filing of the habeas petition, and not on the circumstances of the underlying conviction. *Arthur v. Allen, supra* at 1253.

Given the extraordinary circumstances in this case and the diligence established by the Petitioner,[8] this Court should grant certiorari review of the Eleventh Circuit's decision in this case for the following reasons.

**A. Facts In Support of Equitable Tolling.**

Despite a long and documented history of an "unstable mental condition," *Holland v. State*, 773 So. 2d 1065, 1069-70 (Fla. 2000), Petitioner's own actions more than establish both extraordinary circumstances accompanied by the

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[8]The Eleventh Circuit never addressed the issue of Petitioner's diligence.

requisite showing of diligence such that equitable tolling is appropriate. It is difficult to imagine what else Petitioner could have done; if the circumstances presented below do not establish diligence, then the concept simply has no relevant meaning. Indeed, the Eleventh Circuit did not attribute the late filing of Petitioner's habeas petition to a lack of diligence; rather, the direct cause of the late filing was due to the fact that Mr. Collins acted in a "grossly negligent" manner in failing to timely file the petition "despite repeated instructions to do so" from Petitioner (Attachment A at 9).

Early on in Mr. Collins's representation of Petitioner in state court, Petitioner sought assurances from Mr. Collins that his deadlines, both state and federal, would be honored. For example, in early 2002, Petitioner sought reassurance from Mr. Collins that his state postconviction motion would be filed timely and that his federal habeas deadline be secured; in response, Mr. Collins informed Petitioner that he was "aware of state time-limitations and federal exhaustion requirements" (DE38, Appendix B). Unsatisfied with Mr. Collins's representation in the time period leading up to and including the filing of his Rule 3.851 motion, Petitioner sought to file, in the state circuit court, a motion to supplement the record with additional issues that Mr. Collins did not include as claims for relief; the state circuit court, however, struck Petitioner's pleading as a nullity in light of the fact that he was represented by counsel (DE38, Appendix

C).[9] In his December 23, 2002, correspondence to Petitioner, Mr. Collins noted that Petitioner's claims "will [] be ripe for presentation in a petition for writ of habeas corpus in federal court" should the Florida Supreme Court deny collateral relief and "should the United States Supreme Court deny any petition for writ of certiorari" (DE38, Appendix C at 3).[10] Mr. Collins further reassured Petitioner by letter dated January 22, 2003, that if the circuit court were to deny relief, he would ensure that the "proper appeals" would be undertaken and asked for Petitioner's "confidence" and "sense of unity" in "this very delicate matter" (DE38, Appendix F).

An evidentiary hearing on Petitioner's Rule 3.851 motion took place in April, 2003, and the state circuit court denied relief in May, 2003. Remaining unsatisfied with Mr. Collins's representation, Petitioner, on July 18, 2003, filed a

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[9]Logs generated by the Florida Department of Corrections establish that from the time of his appointment until his representation ceased in 2006, Mr. Collins visited Appellant at Union Correctional Institution only two times prior to the filing of the Rule 3.851 motion: on January 29, 2002, for approximately three (3) hours, and again on September 13, 2002, for approximately 90 minutes (DE38, Appendix D). Mr. Collins's investigator, Don Carpenter, visited Appellant two times Union Correctional Institution, on October 4, 2002, and November 6, 2002, both of which were subsequent to the filing of the Rule 3.851 motion (DE38, Appendix E). Mr. Collins did also meet with Appellant one time while Appellant was in Broward County for his evidentiary hearing in April, 2003.

[10]Based on this language, it is clear that Mr. Collins was under the belief that Petitioner's time to file his federal habeas petition would continue to be tolled until this Court denied certiorari from the state courts' determination of his collateral claims for relief. Significantly, in 2002, Mr. Collins did not take the position that Petitioner's statute of limitations had already expired by the time he was appointed in November, 2001; Mr. Collins substantially changed his position when confronted with the fact that he had missed the deadline to file Petitioner's habeas petition.

grievance with The Florida Bar, noting that his Rule 3.851 motion had been denied on May 16, 2003, that Mr. Collins had failed to adequately represent him, and that he was concerned that his legal issues be presented to the state courts so they "will not be procedurally barred when I get to the Federal Courts" (DE38, Appendix G). The Florida Bar, on August 20, 2003, refused to initiate an investigation into Petitioner's complaints, however (DE38, Appendix H). In the meantime, while Petitioner's complaints were pending with The Florida Bar, he sought relief in the Florida Supreme Court on August 8 and 18, 2003 (DE38, Appendix I at 1).[11] The State of Florida moved to strike these pleadings because they were unauthorized as Petitioner was represented by counsel (DE38, Appendix I at 1), and, on October 30, 2003, the Florida Supreme Court granted the State of Florida's motion (DE38, Appendix I at 2).

Petitioner's concern at this time was the fact that Mr. Collins had not been in communication with him concerning the pending appeal; as evidenced in the Florida Supreme Court's docket, Petitioner himself inquired by letter to the Florida Supreme Court as to the status of when the appeal was filed and when the record on appeal was due to be filed (DE38, Appendix I at 1). Petitioner again

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[11]According to the Florida Supreme Court docket, Petitioner's *pro se* pleadings were construed as motion to amend and supplement state habeas corpus petition (DE38, Appendix I). However, Mr. Collins had not yet filed a state habeas corpus petition for Petitioner; it was not filed until January 9, 2004 (DE38, Appendix J). Of course, given Petitioner's lack of legal knowledge and the fact that he was suffering what the Florida Supreme Court determined to be an "unstable mental condition," the fact that he was confused about what to file and when further establishes that Mr. Collins had a heightened duty to keep Petitioner informed of the status of his case.

contacted the Florida Supreme Court as reflected in the November 24, 2003, docket entry, and the Court advised Petitioner when his Initial Brief was due to be filed (DE38, Appendix I at 2). After another unsuccessful attempt to amend and supplement a state habeas petition (DE38, Appendix J at 1), Petitioner, on February 23, 2004, filed a *pro se* motion to remove Mr. Collins as his counsel and to appoint competent conflict-free counsel (DE38, Appendix I at 2; Appendix J at 1). The State of Florida opposed the motion, and, on May 5, 2004, the Florida Supreme Court granted the State's motion and struck Petitioner's *pro se* motion (DE38, Appendix I at 3).

In the meantime, Petitioner, still not able to get updated information from Mr. Collins about the status of his case, wrote to the Florida Supreme Court on April 23, 2004, requesting a copy of the State's Answer Brief, which had been filed on April 15, 2004 (DE38, Appendix I at 3). On April 29, 2004, the Florida Supreme Court advised Petitioner that he would have to pay for copies of the requested documents (Appendix I at 3). It was *after* the Florida Supreme Court was aware that Mr. Collins had not provided Petitioner with the State's Answer Brief that, on May 5, 2004, it granted the State's motion to strike Petitioner's *pro se* request for competent counsel to represent him. At no time did the Florida Supreme Court appear to even attempt to engage in any "monitoring" of Mr. Collins's performance pursuant to its statutory mandate. *See supra* n.6.

Petitioner again sought to remove Mr. Collins on June 17, 2004, this time requesting a hearing pursuant to *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA

1973) (DE38, Appendix I at 3; Appendix J at 2).[12] On July 7, 2004, the Florida Supreme Court ordered both Mr. Collins and the State to respond (DE38, Appendix I at 4; Appendix J at 2). Without ordering a hearing, the Florida Supreme Court, on October 22, 2004, denied Petitioner's motion, again without attempting to comply with its mandated oversight of Mr. Collins's representation of Petitioner (DE38, Appendix I at 4).

The briefing in Petitioner's appeal to the Florida Supreme Court was concluded by the filing of his Reply Brief on June 16, 2004 (DE38, Appendix I at 3). Oral argument was conducted on February 10, 2005 (DE38, Appendix I at 4). On March 3, 2005, Petitioner wrote to Mr. Collins the following, in pertinent part:

> I write this letter to ask that you please write me back as soon as possible to let me know what the status of my case is on appeal to the Supreme Court of Florida.
>
> If the Florida Supreme Court denies my 3.850-3.851 and state habeas corpus appeals, **please file my 28 U.S.C. 2254 writ of habeas corpus petition, before my deadline to file it runs out (expires).**

(DE38, Appendix K) (emphasis added). Having heard nothing from Mr. Collins despite his written request for a status, Petitioner, on June 15, 2006, again wrote to Mr. Collins:

> On March 3, 2005, I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.

---

[12] In *Nelson*, the court set forth a procedure requiring a trial court to inquire of a defendant and appointed counsel when allegations of incompetency are made and, if established, to appoint substitute counsel or allow the defendant to proceed *pro se*. *Nelson*, 274 So. 2d at 259.

**Also, have you begun preparing my 28 U.S.C. §2254 writ of habeas corpus petition? Please let me know, as soon as possible.**

(DE38, Appendix L) (emphasis added).[13]

Not only was Petitioner vainly attempting to secure the status of his appeal from Mr. Collins, he was also informing Mr. Collins about the need to begin preparing his federal habeas corpus petition so that it would be filed within the deadline. However, as noted above, Petitioner received no response at all from Mr. Collins. Undeterred, Petitioner took additional steps while his case was still in state court in order to keep updated as to the status of his appeal. In October, 2005, Petitioner contacted the Florida Supreme Court about how to find his case on its website so that Petitioner could secure the assistance of outside supporters to keep him updated about the appeal;[14] in response, the Florida Supreme Court clerk mailed him printouts of the website with instructions as to which menu options should be used (DE38, Appendix N).

On November 10, 2005, the Florida Supreme Court issued its opinion

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[13]Mr. Collins never responded to either of Petitioner's afore-discussed letters, a fact that is conclusively established by the Department of Corrections logs, which provide meticulous detail as to each and every piece of incoming mail sent to death row inmates. In preparation for an equitable tolling argument in the lower courts, Petitioner sought these logs from the Department of Corrections on February 5, 2006; Sergeant Overtrop of Union Correctional Institution responded to Petitioner's request by informing him that he pulled "all logs" from January 1, 2004, until February 6, 2006, and these logs revealed that Petitioner received only five (5) pieces of mail from Mr. Collins during this time period: January 14, 2004, June 16, 2004, July 19, 2004, January 19, 2006, and February 6, 2006 (DE38, Appendix M).

[14]There are no computers accessible to any death-row inmates at Union Correctional Institution.

affirming the denial of the Rule 3.851 appeal and denied the state habeas petition. Shockingly, Mr. Collins **never informed Petitioner, either by legal phone call or by letter, that his appeal had been denied.**[15] Because he was unaware that the appeal had been denied, he again contacted the Florida Supreme Court by letter dated December 21, 2005, in order to inquire about the status of his case and when the mandate from his direct appeal had issued (DE38, Appendix P).[16] In a written communication dated December 28, 2005, the Florida Supreme Court, referring to Case No. SC03-1033 (which was the case number for Petitioner's Rule 3.851 appeal), informed Petitioner that he would need to contact the Florida State Archives in order to obtain the mandate issued in his direct appeal case (DE38, Appendix O). Inexplicably, despite acknowledging that Petitioner's request was also for a status of Case No. SC03-1033, *never* informed him that, in fact, the mandate in the Rule 3.851 appeal had also been issued and that the appeal had been denied on November 10, 2005. And, because he still had no idea that his

---

[15]Petitioner received confirmation of this from Sgt. Overtrop pursuant to his request that Overtrop review the phone logs; according to Overtrop, Petitioner received no legal phone calls from Mr. Collins (or anyone else for that matter) in November, 2005 (DE38, Appendix O).

[16]Petitioner believed that the date of the mandate on direct appeal was significant in order for him to be able to ascertain when the federal habeas would be due since he had never heard anything from Mr. Collins about the status of the case. Clearly, this request indicates that Petitioner was making a diligent effort to ascertain how much time he had left on his statute of limitations if and when the Florida Supreme Court were to deny relief (DE38, Appendix Q). Of course, at the time he made his request to the Florida Supreme Court on December 21, 2005, he had no idea that the Court had denied his appeal already and, in fact, mandate had already issued on December 1, 2005.

appeal had been denied, Petitioner, on January 9, 2006, requested permission from the Department of Corrections to visit the "writ room" in order to see if he could ascertain the status of his case from the legal library (DE38, Appendix R); however, the Department of Corrections inexplicable "refused" his request (*Id.*). Because this request to visit the writ room was denied, Petitioner *again* wrote to Mr. Collins on January 9, stating as follows:

> I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. **Have my appeals been decided yet?**
>
> Please send me the date when the "mandate" was issued in my case.[17] If you could please send me a copy of said "mandate" so that I can determine when the deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable "Antiterrorism and Effective Death Penalty Act," **if my appeals before the Supreme Court of Florida are denied.**
>
> Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.
>
> Mr. Collins, would you also please inform me, as to which United States District Court my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition will be have to be timely filed in and that court's address?
>
> Thank you very much.

(DE38, Exhibit Q) (emphasis added).

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[17]Petitioner's inquiry of Mr. Collins puts into context his request of the Florida Supreme Court on December 21, 2005, for a copy of the direct appeal mandate. Petitioner did follow through with the Florida Supreme Court's direction that he contact the Florida State Archives in order to get a copy of the direct appeal mandate; on January 27, 2006, Petitioner received the requested documents from the Archives (DE38, Appendix S).

Having still not heard anything from Mr. Collins, having not been informed by the Florida Supreme Court's December 28, 2005, communication, that his appeal had been already denied and that mandate had been issued, and having been inexplicably denied the opportunity to go to the writ room on January 9, 2006, Petitioner again, on January 18, 2006, requested and was granted permission to go to the writ room to attempt to ascertain the status of his case (DE38, Appendix T). It was on this date–January 18, 2006–that Petitioner learned for the first time that his appeal had already been denied over two (2) months earlier. As a result, Petitioner, the following day–January 19, 2006–made an emergency request for a telephone call to Mr. Collins the first thing in the morning because, as Petitioner himself wrote, "It's important!!" (DE38, Appendix U). That request was approved (*id.*). Because he was now aware that his state appeals had been denied over two (2) months earlier, Petitioner, following his visit at the writ room on January 18, 2006, immediately prepared his *pro se* habeas corpus petition, which he mailed to the district court clerk for filing on January 19, 2006.

Coincidentally, Mr. Collins had written a letter to Petitioner which Petitioner received on January 19, 2006 (the same day that Petitioner mailed his *pro se* habeas petition to the district court), requesting that Petitioner fill out the *in forma pauperis* documentation necessary to file a *certiorari* petition in this Court (DE38, Appendix V). By the time Petitioner received this letter, he had already spoken with Mr. Collins in the morning of January 19. In his written response to Mr. Collins's letter on January 20, 2006, Petitioner noted that he was "left to

understand" that Mr. Collins was intent on filing a *certiorari* petition but that it was Petitioner's understanding that the AEDPA statute of limitation was "not tolled" during this period, and therefore advised Mr. Collins "not to file certiorari if doing so affects or jeopardizes my one-year grace period as prescribed by the AEDPA" (DE38, Appendix V).[18]

On January 27, 2006, Petitioner again communicated with Mr. Collins to request information on what Mr. Collins had filed on Petitioner's behalf and to send him copies (DE38, Appendix W), and, on January 30, 2006, again wrote to Mr. Collins with some legal research indicating that the time for seeking *certiorari* from the state court's denial of collateral relief would not toll the AEDPA statute of limitations (DE38, Appendix X). In response to Petitioner's letter of January 20, 2006, Mr. Collins acknowledged that there was a "hurdle" to overcome "concerning operation of AEDPA time limitations," but, expressing a gross and negligent understanding of basic federal habeas law, expressed his view that Petitioner's time for filing his federal habeas "began to run after the case was affirmed [by the Florida Supreme Court] on October 2, 2000" and that therefore "the period had run before my appointment and therefore before your Rule 3.850 motion was filed" (DE38, Appendix Y). Mr. Collins further expressed his understanding that a *certiorari* petition was Petitioner's "only technically timely remedy" and that filing a *certiorari* petition "will have no effect on the viability of

---

[18]In reality but unbeknownst to Petitioner, his concern was moot since the Florida Supreme Court had denied relief in November, 2005, and Mr. Collins never informed Petitioner of this denial.

the federal habeas corpus remedy" (*Id.*). In response to this letter, Petitioner, on February 9, 2006, wrote to Mr. Collins:

> I received your letter dated January 31, 2006. You are incorrect in stating that "the one-year statutory time frame for filing my 2254 petition began to run after my case was affirmed on October 5, 2000, by the Florida Supreme Court." As stated on page three of my Petition for a Writ of Certiorari, October 1, 2001, is when the United States Supreme Court denied my initial petition for writ of certiorari and that is when my case became final. That meant that time would be tolled once I filed my 3.850-3.851 motion in the trial court.
>
> Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U.S.C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred.
>
> You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005, decision denying my postconviction appeals. You never kept me informed about the status of my case, although you told me that you wold immediately inform me of the court's decision as soon as you heard anything.
>
> Mr. Collins, I filed a motion on January 19, 2006, to preserve my rights because I did not want to be time-barred. Have you heard anything about the aforesaid motion? Do you know what the status of aforesaid motion is?
>
> Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting any more time (valuable time).
>
> Again, please file my 2254 Petition at once.
>
> Your letter is the first time that you have ever mentioned anything to me about my time had [sic] run out, before you were even appointed to represent me, and that my one-year started to run on October 5, 2000.
>
> Please find out the status of my motion that I filed on January 19, 2006, and let me know.

(DE38, Exhibit Z).

**B. "Gross Negligence" by Collateral Counsel is an "Extraordinary Circumstance" Warranting Equitable Tolling.**

While it is generally true, and Petitioner does not contend otherwise, that garden variety attorney mistakes do not constitute "extraordinary circumstances" to warrant equitable tolling, the issue presented by Petitioner is whether the "gross negligence" found by the Eleventh Circuit does qualify as such a circumstance, and whether any allegation of lawyer negligence or misconduct, short of bad faith, dishonesty, divided loyalty, or mental impairment, can satisfy the definition of an "extraordinary circumstance" such that equitable tolling is warranted.[19] Under the new test set out by the Eleventh Circuit, *no* allegation of lawyer misconduct, even gross misconduct, can qualify for an exceptional circumstance. This truncated holding essentially eviscerates the doctrine of equitable tolling and conflicts with the holdings of numerous other circuits.

At the outset, it is important to note that, until Petitioner's case was pending in the Eleventh Circuit, that court had not yet addressed whether attorney conduct beyond "mere negligence" could constitute an extraordinary circumstance warranting equitable tolling. In *Downs v. McNeil*, 520 F. 3d 1311 (11th Cir. 2008), the Eleventh Circuit held for the first time that attorney misconduct going beyond "mere negligence" can constitute an extraordinary circumstance warranting

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[19]To be sure, Petitioner does not agree that the "gross negligence" found by the Eleventh Circuit fails to satisfy some of the arbitrary criteria set out in the Eleventh Circuit's opinion. For example, in Petitioner's view, "gross negligence" of counsel certainly qualifies as bad faith and demonstrates, at the least, divided loyalties.

equitable tolling. Yet in Petitioner's case, the Eleventh Circuit effectively announced that *Downs* did not really mean what it said and limited its holding to such an extent as to render it meaningless for purposes of a reasoned equitable tolling analysis and to place Petitioner's case in direct conflict with other circuits.

To properly put Petitioner's contentions in this petition into their proper context, it is first important to discuss what the Eleventh Circuit held in *Downs*, and, just as importantly, what it did not hold in *Downs*. At issue in *Downs* was whether the Eleventh Circuit would join those circuits which have allowed equitable tolling due to "some forms of serious attorney misconduct," or whether this Court would agree with the lone circuit –the Seventh Circuit – to adopt a "bright-line approach" refusing to allow equitable tolling when the reason for the late filing is attributable to the misconduct or negligence, no matter how serious, of the defendant's collateral counsel. *Downs*, 520 F. 3d at 1319. After discussing the holdings of the various circuits, the *Downs* court declined to follow the bright-line approach of the Seventh Circuit in favor of an analysis that truly reflects the fact that equitable tolling is, after all, an *equitable remedy*. *Downs*, 520 F. 3d at 1321 ("bright-line rules do not govern the court's exercise of its equitable powers") (citing cases). Hence, the *Downs* court embraced the line of cases from other circuits which have provided a basis for equitable tolling in instances where, for example, the attorney has made misrepresentations to the client, disregarded the client's instructions, refused to return documents, or abandoned the client's case. *Id.* at 1321-22 (discussing cases). After discussing with approval the line of

cases from other circuits, the *Downs* court concluded by holding that "the fact-specific, case-by-case approach taken by the majority of our fellow circuits is better suited to an equitable inquiry than is the bright-line approach to egregious attorney misconduct adopted by the Seventh Circuit[]." *Id.* at 1322 (footnote omitted).

Nothing in *Downs* could be read to state that only allegations of "reckless factual misrepresentation or of lawyer dishonesty" (Attachment A at 9), could, to the exclusion of any other allegation, constitute an extraordinary circumstance warranting equitable tolling. In fact, in *Downs*, the Court stated it would "not dissect the continuing course of conduct in which counsel engaged, but rather view counsel's behavior as a whole," and acknowledged that while overt dishonesty could constitute equitable tolling, other factors, such as disregarding client instructions or effective abandonment of the client, could also constitute an extraordinary circumstance warranting equitable tolling. *Downs*, 520 F. 3d at 1321-23.

Yet in Petitioner's case, the Eleventh Circuit indeed focused on the lack of allegations of the overt false representations made in *Downs*, to the exclusion of the Petitioner's other equally serious allegations, and faulted Petitioner for not having similar allegations to those in *Downs*:

> no allegations of lawyer negligence or of failure to meet a lawyer's standard of care–in the absence of an allegation and proof of, bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part– can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough. This case is a pure

> professional negligence case. We decline to extend *Downs* to the different facts of this case.[]

(Attachment A at 9-10)

As the *Downs* court noted, other circuits have extended equitable tolling to circumstances involving some forms of serious attorney misconduct or negligence, and not just to allegations of overt lying by counsel or actual dishonesty. For example, the *Downs* court cited to and discussed *Baldayaque v. United States*, 338 F. 3d 145 (2d Cir. 2003), noting that the Second Circuit, in considering the allegations there, which included the attorney ignoring the directive of the defendant to file a §2255 petition and failing to communicate with the client, determined that the attorney's actions, "taken together," might warrant equitable tolling. *Downs*, 520 F. 3d at 1321. There was nothing in *Baldayaque* that discussed actual lying or overt dishonesty, yet the *Downs* court cited it with approval, as it also cited other similar cases. *See Fleming v. Evans*, 481 F. 3d 1249 (10th Cir. 2007); *United States v. Martin*, 408 F. 3d 1089 (8th Cir. 2005); *United States v. Wynn*, 292 F. 3d 226 (5th Cir. 2002); *Spitsyn v. Moore*, 345 F. 3d 796 (9th Cir. 2003).[20]

By first embracing this line of cases in *Downs* and deciding their reasoning would govern the Circuit's jurisprudence, and then by openly distancing itself

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[20]As the *Downs* court also noted, nothing in this Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007), can be read to exclude equitable tolling due to circumstances extending beyond mere attorney negligence. *Downs*, 520 F. 3d at 1319. Here, as the Eleventh Circuit acknowledged, we are dealing with "gross negligence," not garden variety, or "mere" negligence (Attachment A at 9).

from these very cases, the Eleventh Circuit in Petitioner's case effectively returned the Circuit to pre-*Downs* status by enforcing the very "bright-line" rule it rejected in *Downs*. By holding that "no allegation of lawyer negligence or of failure to meet a lawyer's standard of care" – absent bad faith, dishonesty, divided loyalty, or mental impairment on part of the attorney – can rise to the level of "egregious attorney misconduct that would entitle Petitioner to equitable tolling," the panel not only effectively overruled *Downs* and limited it in such an unprecedented way as to render its holding meaningless in cases not involving overt bad faith or dishonesty, but also aligned, once again, the Eleventh Circuit with the Seventh Circuit in its bright-line approach.

The "gross negligence" that the Eleventh Circuit found in Petitioner's case is just as deserving of equitable tolling as the lies and misrepresentations found to warrant an evidentiary hearing in *Downs*. This is not a case of garden-variety or after-the-fact miscalculation, but a flagrant failure by attorney Collins to adhere to his client's request to timely file his habeas petition. Collins gave no advance warning to Petitioner that he would not or could not timely file the habeas petition on time as promised to Petitioner and as Petitioner had repeatedly implored him to do while his appeal was still pending in the Florida Supreme Court. *See Nara v. Frank*, 264 F. 3d 310, 320 (3d Cir. 2001) (noting that evidentiary hearing warranted where petitioner alleged, *inter alia*, that habeas petition filed late because state postconviction counsel told petitioner that there were no time constraints to timely filing and led petitioner to believe a timely petition would be

filed; these "serious allegations" would constitute extraordinary circumstances, if proven to be true). *See also Baldayaque*, 338 F. 3d at 152-53.

Due to Collins's "gross negligence," Petitioner never received any communication that his appeal to the Florida Supreme Court had been denied on November 10, 2005, despite repeated requests to Collins in the preceding months for a status of the case. This failure by Collins to keep Petitioner apprised of the denial of his appeal is not only a violation of the Florida Rules of Professional Conduct,[21] but also constitute grounds for equitable tolling, at least in other circuits. "[A] prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the manner." *Woodward v. Williams*, 263 F. 3d 1135, 1143 (10th Cir. 2001). *See also Phillips v. Donnelley*, 216 F. 3d 508, 511 (5th Cir.) (Remanding for district court to determine the date on which the petitioner first received notice of the denial of his state appeal), amended in part, 223 F. 3d 797 (5th Cir. 2000); *Knight v. Schofield*, 292 F. 3d 709, 711 (11th Cir. 2002) (prisoner entitled to equitable tolling because, despite diligence, he had not been timely informed of the denial of state collateral relief); *Thompson v. Smith*, 2006 U.S. App. LEXIS 5620 at *12 (11th Cir. 2006) (unpub.) ("When outside forces, such as

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[21]*See* Rule Regulating the Florida Bar 4-1.4 (a)(1), (2) (3) & (4) (A lawyer "shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information").

the courts themselves, act independently of the petitioner to prevent him from timely filing a petition for habeas corpus, then, provided that the petitioner has exercised diligence, the district court may properly apply the doctrine of equitable tolling").

Because the Eleventh Circuit's conclusion that "gross negligence" does not qualify as an exceptional circumstance warranting equitable tolling has placed the Eleventh Circuit squarely in conflict with other circuits, and has essentially eviscerated a defendant's entitlement to equitable tolling under certain circumstances, Petitioner submits that certiorari review of the Eleventh Circuit's decision is warranted at this time.

## CONCLUSION

Based on the foregoing arguments and authorities, the Petitioner respectfully requests that the Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, on this 13th day of May, 2009.

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# OPPOSITION BRIEF

CASE NO. 09-5327

IN THE UNITED STATES SUPREME COURT

October 2009 Term

**********

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

**********

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

# RESPONDENT'S BRIEF IN OPPOSITION

**********

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## QUESTION PRESENTED

**(Restated)**

**(Capital Case)**

Whether this Court should grant review of the Eleventh Circuit Court of Appeal's denial of equitable tolling based on ordinary attorney negligence based on the particular facts of this case?

Whether equitable tolling is available to toll the statute of limitation under the AEDPA where the statutory language is in clear conflict with the principle of equitable tolling?

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## CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as Holland v. Florida, 539 F.3d 1334 (11th Cir. 2008).

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), except as argued herein. However, although this Court has jurisdiction pursuant to § 1254(1), Respondent submits that no question contained in the petition is worthy of this Court's consideration.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth Amendment to the United States Constitution.

The federal habeas statute of limitations, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d), provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

© the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In addition, 28 U.S.C. § 2254(I) specifically states:

The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

## STATEMENT OF THE CASE AND FACTS

On August, 16, 1990, Petitioner was indicted for: Count I, the first-degree murder of Officer Scott Winters with a firearm; Count II, armed robbery of Officer Scott Winters; Count III, sexual battery on Thelma Smith Johnson with a deadly weapon or physical force likely to cause serious personal injury; and Count IV, attempted first-degree murder of Thelma Smith Johnson with a deadly weapon, all stemming from incidents that occurred on July 29, 1990.

After jury trial, the jury found Holland guilty as charged on all counts. On August 12, 1991, the jury recommended a sentence of death, by a vote of 11 to 1. Holland was sentenced to death on August 19, 1991, for the first-degree murder of Officer Winters; however, his convictions and sentences were reversed on appeal to the Florida Supreme Court. See Holland v. State, 636 So.2d 1289 (Fla. 1994). The Florida Supreme Court held that Holland's Fifth and Sixth Amendment rights were violated by the admission of testimony from a State psychiatrist who had interviewed Holland in jail without prior notice to defense counsel. Id. The State filed a Petition for Writ of Certiorari in the United States Supreme Court, challenging the reversal. However, on October 11, 1994, the United States Supreme Court denied the petition. Florida v. Holland, 513 U.S. 943 (1994).

Holland was re-tried before a jury beginning September 24, 1996 and was found guilty as charged on: Count I, the first-degree murder of Officer Scott Winters with a firearm; Count II, armed robbery of Officer Scott Winters; and Count IV, attempted first-degree murder of Thelma Smith Johnson with a deadly weapon. On Count III, the jury found Holland guilty of the lesser-included offense of Attempt to Commit Sexual Battery upon a person twelve years of age or older. On November 15, 1996, the jury recommended a sentence of death, by a vote of 8 to 4. On February 7, 1997, the trial court sentenced Holland to death for the first-degree murder of Officer Winters and to a consecutive life sentence for the armed robbery of Officer Winters, a consecutive 15 year sentence for the attempted sexual battery on Thelma Smith Johnson, and a consecutive 30 year sentence for the attempted murder of Thelma Smith Johnson.

Holland appealed his convictions and sentences to the Florida Supreme, raising twenty-two issues.[1] Affirming the convictions and sentences on direct appeal, the

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[1] The issues raised on appeal were: whether the trial court erred in denying Holland his right of self-representation; whether the trial court erred in its instructions as to the intent requirement on felony-murder and attempted sexual battery; whether the trial court erred in denying appellant's motion to exclude the testimony of experts who had reviewed the report of Dr. Strauss; whether the trial court erred in failing to recuse State Attorney Michael Satz and/or the State Attorney's Office; whether the trial court erred in prohibiting the re-deposition of certain witnesses; whether the trial court erred in overruling appellant's objection to the admissibility of an inaudible videotape; whether the trial court erred in failing to suppress Mr. Holland's

Florida Supreme Court found the following facts:

> Holland attacked a woman he met on July 29, 1990. Holland ran off after a witness interrupted the attack. Police officers responding to a call about the attack found the woman semi-conscious with severe head wounds. Officer Winters and other officers began searching for the man believed to have been involved in the attack. A short time later, witnesses saw Officer Winters struggling with Holland. During the struggle, Holland grabbed Officer Winters' gun and shot him. Officer Winters died of gunshot wounds to the groin and lower stomach area.
>
> The jury convicted Holland of first-degree murder, armed robbery, attempted sexual battery, and attempted first-degree murder. The jury recommended by an eight-to-four vote that Holland be sentenced to death. The trial court found the following aggravating circumstances:

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statements; whether the trial court erred in admitting the hearsay testimony of Dr. Tate; whether the trial court erred in denying the motion for judgement of acquittal as to premeditation; whether the trial court erred in allowing a state witness to testify as to speculation; whether the trial court erred in using the wrong legal standard in rejecting mitigation; the trial court made several factual errors in its evaluation of the testimony of defense mental health experts; whether the trial court relied on a factual error in rejecting a statutory mental mitigating circumstance; whether the trial court erred in failing to consider non-statutory mitigating circumstances supported by the evidence; whether the trial court erred in allowing the State to bring out the facts of a prior offense of which Holland had been acquitted and which was not relevant; whether the trial court improperly used the attempted sexual battery to support two aggravating circumstances; whether it was error to instruct the jury and to find the aggravating circumstance that the capital felony was committed during a robbery; whether the trial court erred in allowing the use of victim impact evidence; whether the trial court erroneously applied a presumption of death; whether the felony murder aggravating circumstance (Florida Statutes 921.141(5)(d)) is unconstitutional on its face and as applied in this case; whether the death penalty is disproportionate; whether electrocution violates the Florida and United States Constitutions.

> (1) the defendant was previously convicted of a felony involving the use or threat of violence to a person; (2) the capital felony was committed while the defendant was engaged in the commission of, or in an attempt to commit, or flight after committing or attempting to commit the crime of robbery or an attempt to commit the crime of sexual battery or both; and (3)(a) the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, merged with (3)(b) the victim of the capital felony was a law enforcement officer engaged in the performance of his legal duties. The court did not find that any statutory mitigating circumstances were established, but did find the existence of two nonstatutory mitigating circumstances: (1) history of drug and alcohol abuse (little weight) and (2) history of mental illness (little weight). The trial court concluded that the aggravators outweighed the mitigators and sentenced Holland to death.

Holland v. State, 773 So.2d 1065, 1068 (Fla. 2000).

Thereafter, on May 4, 2001, Holland filed a Petition for Writ of Certiorari in the United States Supreme Court raising two issues.[2] On October 1, 2001, the United States Supreme Court denied the petition. Holland v. Florida, 534 U.S. 834 (2001).

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[2] 1. Whether the analysis employed by the Florida Supreme Court on denying Mr. Holland's right to self-representation, guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, is contrary to that employed by this Honorable Court in Godinez v. Moran, 509 U.S. 389 (1993) as well as opinions of federal courts of appeal and other state courts of last resort. 2. Whether Florida's felony murder aggravating circumstance genuinely narrows the class of persons eligible for the death penalty as required by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution?

On September 19, 2002, Holland filed a post-conviction motion to vacate his convictions and sentences in the state trial court, raising eight claims.[3] The trial court held an evidentiary hearing on claims III and VIII, after which it found them to be without merit. The court also summarily denied the remaining claims, finding them to be either legally insufficient, refuted by the record, or procedurally barred. Holland appealed the denial of his post-conviction motion to the Florida Supreme Court, raising three (3) issues.[4] Holland also filed a state Petition for Writ of Habeas

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[3] The eight claims alleged that: defense counsel was ineffective for failing to object to the testimony of the deputy who found the firearm the day after the incident that the firearm had been intentionally hidden; Defense counsel was ineffective for failing to object when the State misstated the evidence, argued matters not in evidence, shifted the burden of proof, vouched for the credibility of State witnesses, expressed personal belief in Holland's guilt, ridiculed Holland and his defense, engaged in inflammatory argument, accused the defense of denigrating witnesses, and commented on Holland's post-arrest silence; Defense counsel was ineffective because he conceded Holland's guilt to attempted first-degree murder without his consent; The cumulative effect of defense counsel's failure to object to the various alleged procedural errors listed in claim II rendered Holland's trial fundamentally unfair; Holland's death sentence is unconstitutional because a judge determined the aggravating circumstances instead of a jury in violation of the Sixth, Eighth, and Fourteenth Amendments, Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000); and Holland's penalty phase counsel was ineffective because he failed to properly investigate mitigation evidence concerning Holland's birth, childhood, and early adult life.

[4] The issues on appeal argued: the trial court's denial of Claim III is not supported by competent, substantial evidence as counsel conceded Holland's guilt without his authorization resulting in ineffective assistance of counsel; the trial court erred in denying Claim VIII as defense counsel's failure to properly investigate evidence in mitigation denied Holland the effective assistance of counsel guaranteed

Corpus raising four claims of ineffective assistance of appellate counsel.[5]

The Florida Supreme Court affirmed the denial of the post-conviction motion and denied the habeas petition. Holland v. State, 916 So. 2d 750 (Fla. 2005). The Florida Supreme Court issued the mandate on December 1, 2005.

On February 8, 2006, Holland filed a Petition for Writ of Certiorari in the United States Supreme Court.[6] On April 17, 2006, the United States Supreme Court denied the petition. Before the Petition for Writ of Certiorari was filed in the United States Supreme Court, Holland filed a *Pro Se* Petition for Writ of Habeas Corpus in

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by the Sixth Amendment during penalty phase; the trial court erred in summarily denying Claims I, II, IV, V, VI, & VII as they were facially sufficient and not conclusively refuted by the record.

[6] The habeas issues were: whether appellate counsel was ineffective for not challenging the trial court's decision to preclude Holland from referencing internal police documents, which allegedly described incidences when the victim, Officer Winters, used excessive force; whether appellate counsel was deficient for failing to argue that Holland's allegations during the Nelson inquiry were entirely unrefuted and therefore, the trial court's order was not supported by competent, substantial evidence; whether appellate counsel was ineffective for failing to challenge the trial court's denial of a cause challenge to a juror based on racial prejudice and for denial of adequate peremptory challenges; and whether appellate counsel was deficient for failing to raise or discuss an allegedly fundamental sentencing error.

[6] The question was whether, in requiring Holland to show that the outcome "was" changed by his counsel's unilateral concession of guilt of the jointly tried charge of attempted premeditated first-degree murder in light of Holland's trial testimony, the state court decided an important question of federal constitutional law in a way that conflicts with the "reasonable probability" test established by this Court in Strickland v. Washington, 466 U.S. 668 (1984).

the District Court on January 19, 2006.

From November 8, 2001 through May 6, 2006 when he was permitted to withdraw, Bradley M. Collins, Esq. represented Holland. Collins was appointed, for postconviction purposes after the Office of Capital Collateral Regional Counsel–South ("CCRC-South") withdrew from the case because of caseload conflict. During the representation, Holland periodically complained about counsel, as he has about all counsel who have represented him. (DE41: Exh. 1 - Response to Bar Complaint). The District Court eventually appointed current counsel to represent Holland in June 2006. Holland then filed a consolidated pleading arguing that the he was entitled to equitable tolling for filing his habeas corpus petition. (DE 35, 38). The State filed a sur-reply arguing that Petitioner was not entitled to equitable tolling. (DE 41). On April 27, 2007, the District Court entered an order dismissing Holland's § 2254 petition as untimely and holding that equitable tolling was not appropriate given the facts of this case. (DE46). The court then denied Holland's motion to amend judgement. (DE52). Holland filed a timely notice of appeal and the District Court granted a COA on the issue of whether Holland was entitled to equitable tolling. (DE60).

Holland appealed that denial to the Eleventh Circuit which affirmed it on August 18, 2008. Holland v. Florida, 539 F.3d 1334 (11th Cir. 2008). In its opinion

denying relief, the court assumed that equitable tolling was available in theory to toll the AEDPA time limit but found that it was not applicable on the facts of this case. The court determined that the attorney's missing the filing deadline was not egregious conduct but rather negligent since it did not include affirmative misrepresentations, dishonesty, or bad faith but rather was pure-professional-negligence.

## REASONS FOR DENYING THE WRIT

**CERTIORARI SHOULD BE DENIED TO REVIEW THE ELEVENTH CIRCUIT COURT OF APPEAL'S AFFIRMANCE THAT EQUITABLE TOLLING IS NOT AVAILABLE BASED UPON ATTORNEY NEGLIGENCE NOT AMOUNTING TO EGREGIOUS MISCONDUCT SINCE; IT DOES NOT CONFLICT WITH DECISIONS FROM THIS COURT OR OTHER CIRCUITS: THE LOWER COURT PROPERLY APPLIED THE EXISTING LAW TO THE PARTICULAR FACTS OF THIS CASE; AND SECTION 2254(I) PROHIBITS RELIEF UNDER THE AEDPA ON THE BASIS OF POST-CONVICTION COUNSEL'S CONDUCT.**

The Petitioner, Albert Holland, asserts that this Court should review the Eleventh Circuit's decision denying him equitable tolling to file his federal habeas petition. He argues, as he did to the federal district court and to the Eleventh Circuit, that he is entitled to tolling of the statute of limitations under Section 2244 (d)(1)(B) of the AEDPA statute due to the ineffectiveness of his post conviction counsel. He claims that the Eleventh Circuit's decision to deny him relief on the grounds that his

counsel was "grossly negligent" in missing the deadline to file his habeas petition in federal court is in conflict with the decisions in other circuits and creates an impossibly high standard to achieve equitable tolling. Contrary to Petitioner's position, there is no conflict between the Eleventh Circuit and this Court or any other circuit court regarding particular issue and this decision was a proper application of the law. Holland has not established any reason for this Court to grant review of this fact-specific case.

The rule of this Court explaining the considerations governing review on writ of certiorari, rule 10(a), provides:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

In accordance with Rule 10, certiorari review may be granted only for compelling reasons, such as when a decision conflicts with another opinion on an important legal principle or addresses an unsettled question of federal law. The denial of equitable tolling did not conflict with the relevant decisions of this Court or other circuit courts on an important legal principle and did not decide an unsettled question of federal law.

It is undisputed that Holland filed his habeas corpus petition, pursuant to 28 U.S.C. § 2254, 38 days after the one year statute of limitations expired. Holland's judgement and sentence became final on October 1, 2001, when the United States Supreme Court denied his Petition for Writ of Certiorari. Consequently, Holland's one-year time limitation began running on October 1, 2001. Holland waited to file his state motion for post-conviction relief until September 19, 2002, 353 days later. Eleven (11) months and nineteen (19) days of Holland's one-year time limit expired, i.e., were not tolled, prior to the filing of his state motion for post-conviction relief. Holland's post-conviction motion was denied on May 16, 2003, after an evidentiary hearing. Holland appealed to the Florida Supreme Court and it affirmed the denial of relief on November 10, 2005. Mandate issued on December 1, 2005. As such, the time from September 19, 2002--when Holland filed his state post-conviction motion--through December 1, 2005--when mandate issued from the Florida Supreme Court's opinion affirming the denial of the post-conviction motion—was tolled. Consequently, Holland had eleven (11) days after issuance of the mandate, i.e., until December 12, 2005, to timely file his federal habeas petition. However, he did not sign his petition until January 19, 2006, thirty-eight (38) days late.

Neither party disputes the facts; the dispute is over the interpretation of those facts as to whether they constitute "extraordinary circumstances" to warrant equitable

tolling. Collins met with Holland on death row and had his investigator do so as well. He wrote at least eight letters to Holland[7], none of which Holland answered. (DE 38 & 41, ap.). Collins provided Holland with a detailed written strategy of the case, fully pursued post-conviction collateral relief for him, and filed a writ of certiorari in this Court. He also, albeit late, drafted a federal habeas petition. Holland refused to cooperate with Collins and repeatedly sought to get him off the case, just as he did with his previous attorney and his current attorney. (DE 38 & 41). Holland was very familiar with contacting the court system as evidenced by his repeated filings of pro se motions and letters to various courts. (DE 41 & 38, Ap. C, I, & J). As noted by the district court, Holland did not write the Florida Supreme Court for the status of his case until after the deadline to file his federal habeas had already expired even though the decision had been pending for many months. Over the course of his post conviction litigation Holland wrote just three letters to Collins and failed to ever respond to any of Collin's communications. While Collins did fail to notify Holland that the mandate issued and miscalculated the federal habeas deadline, that was merely ordinary attorney negligence or error as both the lower federal courts found. They do not give rise to equitable tolling.

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[7] The letters included one sent after May 30, 2002, and on December 23, 2002, January 22, 2003, January 14, June 15, and July 19, 2004, and on January 18 and 31, 2006.

Nor does Holland dispute that his habeas petition was untimely filed under the AEDPA. Rather, he asserted below that he was entitled to equitable tolling on the basis of post-conviction counsel's conduct. This Court has not decided whether equitable tolling applies to the federal habeas statute. See, Lawrence v. Florida, 549 U.S. 327, 336 (2007) (assuming, without deciding that equitable tolling applies to the AEDPA because the parties did so); Pace v. DiGuglielmo, 544 U.S. 408, 418, n. 8 (2005) (noting the availability of equitable tolling is an open question that has never been addressed by the Supreme Court). However, the district court and the Eleventh Circuit assumed in this case that equitable tolling was an available possible remedy in extraordinary circumstances. The Eleventh Circuit upheld the district court's findings and stated that attorney negligence was not a basis for equitable tolling.

> We will assume that Collins's alleged conduct is negligent, even grossly negligent. But in our view, no allegation of lawyer negligence or of failure to meet a lawyer's standard of care-in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part-can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough. This case is a pure-professional-negligence case.

Holland, 539 F.3d at 1339. The facts underlying those courts' conclusions were undisputed by Holland and it was that factual pattern which necessitated the rejection of his claim for equitable tolling. This Court has consistently held that it does not

review questions that do not affect the outcome of the matter before it. See Coleman v. Thompson, 501 U.S. 722, 730 (1991); Princeton University v. Schmid, 455 U.S. 100, 102 (1982). Moreover, this Court does not grant certiorari to entertain issues that would not be important to anyone besides the parties to this litigation. See Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140, 1140 (1985); Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955). Certiorari should be denied.

Even though this Court has not specifically held that equitable tolling is available when a defendant files his habeas petition after the AEDPA deadline has run, many of the circuit courts have done so but only in limited circumstances. "Equitable tolling" is "an extraordinary remedy which is typically applied sparingly." Steed v. Head, 219 F.3d 1298, 1300 (11TH Cir. 2000). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999); Drew v. Department of Corrections, 297 F.3d 1278, 1287 (11th Cir. 2002). An attorney's negligence is not grounds for equitable tolling. Sandvik; Steed; Howell v. Crosby, 415 F.3d 1250, 1251-52 (11th

Cir. 2005). See Lawrence v. Florida, 421 F.3d 1221 (11th Cir. 2005) (rejecting defendant's claim that the state appointed an incompetent registry counsel, thus, equitable tolling should apply). "Equitable tolling is limited to rare and exceptional circumstances, such as when the State's conduct prevents the petitioner from timely filing" his federal habeas petition. Id. 421 F.3d at 1226. Usually, there must be some affirmative misconduct by the opposing party, such as deliberate concealment. See Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (recognizing equitable tolling allowed in situations where petitioner has been induced or tricked into missing filing deadline by opposing party's misconduct) Arce v. Garcia, 400 F.3d 1340, 1349 (11th Cir. 2005) (same); Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir.2000) (noting state's misconduct necessary to establish propriety for use of equitable tolling). Moreover, as noted in Arthur v. Allen, 452 F.3d 1234, 1252 (11th Cir. 2006): "A petitioner is not entitled to equitable tolling based on a showing of either extraordinary circumstances or diligence alone; the petitioner must establish both. Pace, 544 U.S. 408, 125 S.Ct. 1807, 1815, 161 L.Ed.2d 669 (2005); Justice v. United States, 6 F.3d 1474, 1478-79 (11th Cir. 1993)."

This Court, however, has consistently recognized that equitable tolling is unavailable based upon attorney negligence. See also Lawrence, 127 S. Ct. at 1085; Coleman v. Thompson, 510 U.S. 722, 752-753 (1991). The circuit courts have also

held that attorney negligence in calculating the date a pleading is due, the swiftness of the mail service, or misunderstanding of the law do not entitle the petitioner to equitable tolling. Helton v. Sec'y for Dep't of Corr., 259 F.3d 1310, 1313 (11th Cir. 2001) (agreeing that miscalculation of deadline for filing petition does not establish basis for equitable tolling); Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000)(opining that "attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling ... Any miscalculation or misinterpretation by Steed's attorney in interpreting the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling."); Sandvick, 177 F.3d at 1271-72 (same); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) (finding counsel's confusion about AEDPA's limitations period did not warrant equitable tolling); Harris v. Hutchinson, 209 F.3d 325, 330-31 (4th Cir. 2000) (same); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (holding defense counsel's error in determining limitations period for filing federal habeas petition did not require equitable tolling of statute). Here, Mr. Collins decided to pursue certiorari review and offered a reason for additional tolling of the time to file the federal habeas petition. (DE38-Exh. Y). There is no basis for obtaining jurisdiction in this Court where the alleged conflict is the lower court's proper application of one legal standard and refusal to extend another to the facts of Holland's particular case. This Court has

consistently held that it does not review questions that do not affect the outcome of the matter before it. See Coleman v. Thompson, 501 U.S. 722, 730 (1991); Princeton University v. Schmid, 455 U.S. 100, 102 (1982). As such, certiorari should be denied.

Petitioner argues that the Eleventh Circuit in this opinion retreated from its previous decision in Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008) which found, based upon the unique facts of that case, that serious attorney misconduct could warrant equitable tolling and advocated a fact-specific, case-by-case approach in analyzing the alleged misconduct. The Eleventh Circuit was focused on the possibility that Downs's post conviction counsel overtly lied to him about whether he filed a state petition which would have tolled the AEDPA deadline, an issue of egregious misconduct not present in this case. The Downs court, however, specifically stated that attorney negligence alone was insufficient. That opinion suggested that courts should conduct a fact-specific, case-by-case approach in analyzing allegations of attorney misconduct. Contrary to Holland's assertion, the district court and the Eleventh Circuit did conduct such a fact specific analysis and approach in this case when it found no overt attorney misconduct but rather professional negligence. No "new test" was promulgated, rather the Eleventh Circuit applied the existing law to the individual facts of this case. There is no conflict within

the Circuit and certiorari should be denied.

Petitioner also points to Baldayaque v. United States, 338 F.3d 145 (2nd Cir. 2003) arguing that the fact that the attorney ignored his client's directive to file a §2255 petition might warrant equitable tolling. The attorney there did not follow his client's directive at all, did no legal research, and *never* communicated or even met his client. Even the Baldayaque court stated that ordinary mistakes about when a deadline is or how it is calculated do not trigger equitable tolling. Here, counsel did communicate with Holland at times, filed numerous motions but ultimately miscalculated and missed the filing deadline. Those facts supported the Eleventh Circuit's decision. There is no conflict between the Circuits.

The other cases cited by Holland chiefly involve lies or misrepresentations by the attorney to the defendant thereby allowing the courts to find equitable tolling was appropriate. In Fleming v. Evans, 481 F.3d 1249 (10th Cir. 2007) the attorney conduct in question involved deception and misrepresentations regarding whether counsel was preparing and filing motions. It was those misrepresentations which might allow the district court to grant equitable tolling after an evidentiary hearing. Deception was also present in United States v. Martin, 408 F.3d 1089 (9th Cir. 2005) where the attorney misrepresented the deadline and then repeatedly lied about his progress and having filed the petition. The attorney also failed ever to communicate with the

defendant or his family, actively refusing to attend scheduled meetings or to take telephone calls. The attorney in United States v. Wynn, 292 F.3d 226, 230 (5th Cir.2002) also lied about filing the petition which the defendant relied on those misrepresentations in not seeking to file the petition himself. In Spitsyn v. Moore, 345 F.3d 796, 798 (9th Cir.2003) the court held that "ordinary attorney negligence" will not justify equitable tolling, but found that Spitsyn's attorney's misconduct was sufficiently egregious to warrant equitable tolling under the facts of that case. The attorney failed to do any work on the case for a year before the deadline, failed ever to communicate with the defendant, and failed to give the defendant his file before the AEDPA deadline despite a timely request thereby thwarting defendant's ability to file the petition. While respondent does not agree that any of the foregoing demands a finding of equitable tolling, or that equitable tolling even exists to excuse the failure to timely file, the facts presented here do not rise to the level of misconduct present in those cases and is of a more ordinary nature which would not entitle Holland to equitable tolling.

Petitioner's underlying argument appears to be that he was entitled to the tolling of the statute of limitations under Section 2244(d)(1)(B) of the AEDPA due to the alleged ineffectiveness of his post-conviction counsel. However, it is clear that Holland cannot make those arguments since there is no conflict or any basis to obtain

jurisdiction in this Court, this Court having rejected this same argument as meritless in Lawrence v. Florida, 127 S. Ct. 1079, 1085-86 (2007). Therefore, certiorari should be denied.

The lower courts' determination that equitable tolling is not available when based on attorney negligence and finding that Holland was not entitled to equitable tolling under the facts of this case represents the proper application of this Court's precedent. Once again, Petitioner's allegations amount to nothing more than complaints about the lower courts' proper application of the equitable tolling inquiry to the particular facts of this case. Certiorari should be denied. See Chevron U.S.A., Inc., 471 U.S. at 1140; Rice, 349 U.S. at 74.

Although this Court has not decided whether § 2244(d) allows for equitable tolling, granting equitable tolling of the AEDPA statute of limitations is inconsistent with the text of the statute. This Court has held that equitable tolling is not available in any case when the granting of equitable tolling would be inconsistent with the terms of the relevant statute. See Young v. United States, 535 U.S. 43, 49 (2002); United States v. Beggerly, 524 U.S. 38, 48 (1998). In Beggerly, this Court held that equitable tolling was inconsistent with the terms of a statute of limitation when the statute of limitations already provided that it would not start to run until the litigant knew or should have known of the claim, as that provision allowed for statutory

tolling in situations to which equitable tolling would usually apply. Beggerly, 524 U.S. at 48. Section 2244(d) provides for exceptions to the general statute of limitations based on certain enumerated circumstances, including that the statute of limitations will not begin to run until the facts upon which claims are based could have been discovered through due diligence or until a new retroactive constitutional right that forms the basis for a claim is recognized. 28 U.S.C. § 2244(d)(1)(C) & (D). It also does not start to run until an illegal impediment to filing created by the State is removed or until after the time during which a defendant is actually seeking to exhaust his claims is not counted toward the statute of limitations. 28 U.S.C. § 2244(d)(1)(B) & (2). Thus, granting equitable tolling of the AEDPA statute of limitations is inconsistent with the text of the statute and should not be allowed under Beggerly.

Furthermore, this Court's precedent regarding the inapplicability of relief to remedy post-conviction counsel's conduct is inconsistent with the claim for equitable tolling and the habeas corpus statute. This Court has long recognized that defendants are not entitled to post-conviction counsel, and they, therefore, bear the risk of any procedural default resulting from post-conviction counsel's conduct. Coleman, 501 U.S. at 752-53; see also Lawrence, 127 S. Ct. at 1085. In enacting the AEDPA, Congress codified this holding. 28 U.S.C. § 2254(i). Clearly, as Petitioner's

complaints relate to his post-conviction counsel's alleged ineffectiveness, Petitioner's claim would be "at an end." Coleman, 501 U.S. at 752. Thus, granting equitable tolling based on his allegation of ineffective assistance of post-conviction counsel would be inconsistent with the plain language of the habeas corpus statute and this Court's precedent. After reviewing the undisputed facts and history of the case, the district court and the Eleventh Circuit properly refused to apply equitable tolling in this case. Petitioner's allegations amount to nothing more than a dispute about the application of a properly stated and well-settled rule of law to the facts of this matter. Accordingly, any decision that this Court might issue would be of importance to no one other than the parties to this litigation, a reason for which this Court declines review. See Chevron U.S.A., Inc., 471 U.S. at 1140; Rice, 349 U.S. at 74. This Court should, therefore, deny certiorari. Accordingly, the petition should be denied.

## CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Todd Scher, Esq., 5600 Collins Ave., Suite 15-B, Miami Beach, FL 33140 on October 13, 2009.

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# JOINT APPENDIX

No. 09-5327

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In The
# Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner,*

vs.

STATE OF FLORIDA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## JOINT APPENDIX
## VOLUME I OF II

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**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA**

**Case No. 90-15905CF10A**

**STATE OF FLORIDA,**
**Plaintiff,**

**v.**

**ALBERT HOLLAND.**
**Defendant.**

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**IN THE SUPREME COURT OF FLORIDA**

**Case No. SC03-1033**

**ALBERT HOLLAND,**
Appellant,

v.

**STATE OF FLORIDA,**
Appellee.

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**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

**No. 06-20182-CV-PAS**

**ALBERT HOLLAND,**

Petitioner,

v.

**STATE OF FLORIDA,**

Respondent.

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| | |
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| 3/27/06 | Response by State of Florida to *Pro Se* Emergency Motion to Dismiss Conflict-Counsel and for Appointment of Conflict-Free Counsel and Motion to Dismiss *Pro Se* Petition for Writ of Habeas Corpus |
| 3/29/06 | Order to Show Cause to State of Florida |
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| | |
|---|---|
| 4/28/06 | Response by State of Florida to Order to Show Cause |
| 5/4/06 | State Postconviction Counsel's Response to Court's Order to Show Cause Concerning Petitioner's *Pro Se* Motion to Dismiss Counsel |
| 5/30/06 | *Pro Se* Rebuttal to State Postconviction Counsel Mr. Bradley M. Collins' Response to Court's Order to Show Cause Concerning Petitioner's *Pro Se* Motion to Dismiss Counsel |
| 11/21/06 | Petitioner's Consolidated Reply to Respondent's Response to Show Cause Order, Request for Evidentiary Hearing, Renewed Request to Hold Proceedings in Abeyance Pending Decision in *Lawrence v. Florida,* and Motion to Amend *Pro Se* Habeas Corpus Petition |
| 11/22/06 | Petitioner's Appendix to Consolidated Reply Et. Al. |
| 1/29/07 | Respondent's Sur-Reply to Petitioner's Consolidated Reply Et. Al. And Appendix |
| 4/27/07 | Order Dismissing Petition for Writ of Habeas Corpus As Untimely Filed |
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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

**No. 07-13366-P**

**ALBERT HOLLAND,**
***Petitioner-Appellant,***

**v.**

**STATE OF FLORIDA,**
***Respondent-Appellee.***

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Relevant Docket Entries
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**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA**

**STATE OF FLORIDA,**
**Plaintiff,**
**vs.**
**ALBERT HOLLAND,**
**Defendant.** /

**Case No. 90-15905 CF10A**
**JUDGE: Charles M. Greene**

**MOTION TO STRIKE DEFENDANT'S PRO SE "MOTION TO SUPPLEMENT RECORD ON APPEAL"**

(Filed [Illegible])

COMES NOW Plaintiff, the State of Florida, by and through undersigned counsel and hereby files this "Motion to Strike Defendant's Pro Se 'Motion to Supplement Record on Appeal,'" and as grounds therefor states:

1. Defendant, Albert Holland, is represented by Attorney Bradley M. Collins.

2. On September 17, 2002, Attorney Collins filed a "Motion to Vacate Judgment and Sentence" on behalf of Defendant.

3. The State's Response is due November 21, 2002.

4. Thereafter, on September 22, 2002, Defendant filed a **pro se "Motion to Supplement Record on Appeal"** alleging thirteen

additional grounds in support of his 3.850 motion.[1] Defendant asserts that he asked his attorney to include these grounds in his . . . 850 motion.

5. Defendant's **pro se** motion is a nullity and must be stricken. "A criminal defendant has no Sixth Amendment right to represent himself and, at the same time, to have the assistance of counsel." *Lewis v. State,* 766 So.2d 288, 289 (Fla. 4th DCA 2000), citing *State v. Tait,* 387 So.2d 338, 339-40 (Fla. 1980). Consequently, "pleadings filed by a criminal defendant who is represented by counsel are treated as a nullity." *Id. See also Rose v. State,* 774 So.2d 629, 637 f.n. 12 (Fla. 2000) (holding that trial court did not abuse its discretion by striking pro se motion filed by defendant who was being represented by counsel whom he had not sought to discharge); *Jackson v. State,* 767 So.2d 1156, 1159 (Fla. 2000); *Burke v. State*, 732 So.2d 1194, 1195 (Fla. 4th DCA 1999); *Carlisle v. State*, 773 So.2d 647 (Fla. 5th DCA 2000); *Simpson v. State*, 764 So.2d 788 (Fla. 2d DCA 2000).

---

[1] The undersigned notes that Defendant did not serve the Attorney General's Office, as co-counsel, with his pro se pleading.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/ Debra Rescigno

DEBRA RESCIGNO
Assistant Attorney General
Florida Bar No. 0836907

DEPARTMENT OF
LEGAL AFFAIRS
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9th Floor
West Palm Beach, FL 33401
(561) 837-5000 (phone)

CO-COUNSEL FOR PLAINTIFF

[Certificate of Service Omitted In Printing]

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO. 90-15905 CF10A
JUDGE: Greene

STATE OF FLORIDA,

Plaintiff,

vs.

ALBERT HOLLAND,

Defendant. /

Broward County
Fort Lauderdale, Florida
November 14, 2002

The above-entitled case came on for hearing before the Honorable Charles Greene, as Judge of the Circuit Court, in chambers, room 905, as noticed at 9:34 A.M.

APPEARANCES:

SUSAN BAILEY, ESQUIRE
DEBRA RESCIGNO, ESQUIRE
Appearing on behalf of the State.

BRADLEY COLLINS, ESQUIRE
Appearing on behalf of the Defendant.

STATE'S MOTION TO STRIKE DEFENDANT'S MOTION TO SUPPLEMENT THE RECORD

[2] Thereupon the following proceedings were had:

THE COURT: We are present on the matter of the State of Florida vs. Albert Holland. We are here on the state's motion to strike the defendant's pro se motion to supplement the record on appeal.

Ms. Bailey on behalf of the state.

MS. BAILEY: Good morning, Your Honor. Debra Rescigno from the Attorney General's Office is with me. She filed the written motion.

MS. RESCIGNO: Good morning, Your Honor. We filed this motion. Defense counsel filed his 3850 pleading on September 17th. Then about five days later, Mr. Holland filed a pro se pleading. It's the state's position that that must be stricken, because defendants are not allowed to file a pro se pleading while they are being represented by counsel. Case law is clear that their pleadings are a nullity if they do that. There is case law we cited from the Florida Supreme Court and from the various district courts.

THE COURT: Mr. Collins, do you have –

[3] MR. COLLINS: Good morning, Your Honor. Well, the first part is true, Judge, I did file my motion to vacate judgment and sentence, I went up to see Albert before filing it to get him to sign it. We filed it. Afterwards he had issues on his own that he said he wanted to raise that I received, and I think the state did and probably the Court did, on his own

motion. I've since filed my – I'm not really sure how – it's sort of new territory how to handle it, because I haven't had the client in this stage do this on their own. I advised him not file things on his own; however, I did – I think he raised – there's some points that he raises that may be properly raised. There's some points he raises that are just pled incorrectly. I advised him that there was some grounds under which I can file motions to amend or ask for leave to amend certain grounds.

Then there's the other alternative of filing a, which I did file, a notice of adoption of defendant's supplemental grounds, which is what I filed. I don't know if you have a copy of that. I just did that on November 12th.

THE COURT: I have not received a copy.

[4] MS. BAILEY: Nor did I.

MR. COLLINS: It should be on its way to the court file. When this got set for a hearing, I just filed this. I was trying to think of the best route to take. Basically, I'm asking the Court not to strike it at this time. Albert Holland – I sent my investigator up since I found out that these were filed and had him talk to him. Albert is insistent that every ground that he raises be somehow brought up before the Court. He's insistent on that.

What I'm doing is filing my request to adopt the motion, to the extent that down the road you find the grounds justiciable or legally sufficient, and not

strike it at this time. I'll adopt it and then we'll have to have a hearing on it, I think, at a future date. This is what I'd like to do so that it's not just eliminated from the record.

THE COURT: The Court, pursuant to case law, is going to deem Mr. Holland's pro se filing to be a nullify [sic]. As such, the Court strikes from the record Mr. Holland's supplemental record on appeal. Having been struck, there is nothing for you, as his [5] counsel, to adopt. Certainly without motion and hearing, the Court is not going to allow the adoption just by filing the pleading. So if you wish to somehow proceed further grounds to incorporate or to allege the issues that Mr. Holland has now raised, you can file the appropriate motions.

MR. COLLINS: Okay.

* * *

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 90-15905 CF10A

STATE OF FLORIDA,
Plaintiff(s),
v.
ALBERT HOLLAND,
Defendant(s).
/

Broward County Courthouse
201 Southeast Sixth Street
Room 850
Fort Lauderdale, Florida
April 10, 2003
11:00 a.m. - 12:10 p.m.
1:30 p.m. - 2:05 p.m.

PROCEEDINGS BEFORE
THE HONORABLE CHARLES GREENE

APPEARANCES:
On Behalf of the Plaintiff:
SUSAN BAILEY, ASA
CAROLYN McCANN, ASA

On Behalf of the Defendant:
BRADLEY COLLINS, ESQUIRE

On Behalf of the State of
Florida Office of the Attorney General:
DEBRA RESCIGNO, ESQUIRE

* * *

[4] MR. COLLINS: The other matters I have to bring up with the court, you may recall the last time we saw you on this, Mr. Holland had written the court, and what he had written, remained under seal.

We had a hearing, at which time both parties decided the prudent thing to do was to allow me to review what he has sent to the court, and meet with Albert to make sure that he, in fact, does want what he had sent to the court to be made part of the record.

We had an order transporting him here. He just got here at the end of last week, and I was able to meet with him. He does want me to file what he wrote. I'm giving the state and the attorney general a copy of what was presented to me, and I'm asking the court to accept and make part of the record, what Albert has filed, two documents that are both dated February 21st.

I'm submitting the originals, if I might, [5] Judge, with you.

THE COURT: Any objection?

MS. RESCIGNO: Your Honor, we don't object to it being filed with the record, but it's improper, under the rules for it to be considered as any part of the 3850 motion or any amendment.

THE COURT: Response?

MR. COLLINS: Well, I'm asking that it be supplemented as part of what we have filed and you

can make whatever determinations you deem appropriate.

The history of what's being requested in his letters, I think, speaks for themselves, and the court can make whatever finding you deem appropriate.

I think that as his counsel, I had filed what I thought to be the appropriate grounds. Albert has some of his own things he wants to raise. I think I would like it to be incorporated as part of the record.

Should this result in an appeal, should you rule not in our favor, I think what he raised may have some merit, and I think that court should entertain it.

THE COURT: The issue, unfortunately, with [6] Mr. Holland is that Mr. Holland is represented by counsel.

MR. COLLINS: That's correct.

THE COURT: And the period of time in which to file a petition has already expired. The state has responded. The court has entered its order, and the court, at this juncture, is not going to be considered anything else.

For purposes of preserving your client's record, I'll allow you to file his papers.

The previous correspondence that Mr. Holland has filed, the state moved to strike those, and the court grants that. The pleadings, at this juncture, are closed.

The evidentiary hearing is taking place based upon the court's order, which was entered on February 5th.

You may file the papers.

* * *

**IN THE SUPREME COURT OF FLORIDA**

**ALBERT HOLLAND,**

**Appellant,**

**vs.** **Case No. 90-15905CF**

**STATE OF FLORIDA,**

**Appellee.** /

**MOTION TO STRIKE APPELLANT'S PRO SE "MOTION TO AMEND AND SUPPLEMENT STATE HABEAS CORPUS PETITION"**

COMES NOW Appellee, the State of Florida, by and through undersigned counsel and hereby files this "Motion to Strike Appellant's Pro Se 'Motion to Amend and Supplement State Habeas Corpus Petition,'" and as grounds therefor states:

1. Appellant, Albert Holland, is represented by Attorney Bradley M. Collins.

2. On June 9, 2003, Attorney Collins filed a "Notice of Appeal," on behalf of Appellant, appealing the trial court's denial of Appellant's motion for post-conviction relief, after evidentiary hearing.

3. The Record on Appeal has not yet been filed and is due on September 8, 2003.

4. Appellant has filed a Pro Se **"Motion to Amend and Supplement State Habeas Corpus Petition"** alleging twenty-one claims that he wishes to have supplemented

into his state habeas corpus petition. Defendant asserts that he asked his attorney to include these grounds in his state habeas corpus petition.

5. The State asks that this Court strike Appellant's pleading on two grounds. First, Defendant's **pro se** motion is a nullity and must be stricken. "A criminal defendant has no Sixth Amendment right to represent himself and, at the same time, to have the assistance of counsel." *Lewis v. State*, 766 So.2d 288, 289 (Fla. 4th DCA 2000), citing *State v. Tait*, 387 So.2d 338, 339-40 (Fla. 1980). Consequently, "pleadings filed by a criminal defendant who is represented by counsel are treated as a nullity." *Id. See also Rose v. State*, 774 So.2d 629, 637 f.n. 12 (Fla. 2000) (holding that trial court did not abuse its discretion by striking pro se motion filed by defendant who was being represented by counsel whom he had not sought to discharge); *Jackson v. State*, 767 So.2d 1156, 1159 (Fla. 2000); *Burke v. State*, 732 So.2d 1194, 1195 (Fla. 4th DCA 1999); *Carlisle v. State*, 773 So.2d 647 (Fla. 5th DCA 2000); *Simpson v. State*, 764 So.2d 788 (Fla. 2d DCA 2000).

6. Second, Appellant's pleading is premature. He asserts that his attorney has refused to include these claims in his Petition for Writ of Habeas Corpus, but that document has yet to be filed. This Court does not know, as of this date, what will be included in the State Habeas Corpus Petition.

Respectfully submitted,

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

/s/ Debra Rescigno
DEBRA RESCIGNO
Assistant Attorney General
Florida Bar No. 0836907

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LEGAL AFFAIRS
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COUNSEL FOR Appellee

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DEBBIE CAUSSEAUX
CHIEF DEPUTY CLERK
PORSCHE SHANTZ
STAFF ATTORNEY

PHONE NUMBER (850) 488-0125
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September 11, 2003

RE: ALBERT HOLLAND vs. STATE OF FLORIDA

CASE NUMBER: SC03-1033
Lower Tribunal Case Number: 90-15905 CF 10A

The Florida Supreme Court has received the following documents reflecting a filing date of 09/10/2003.

Letter dated September 8, 2003 – (filed by Albert R. Holland, Jr.)

In response to the above letter, please be advised that a Notice of Appeal (3.850 Evidentiary Hearing) was filed with this Court on June 9, 2003, by Attorney Bradley M. Collins. The record on appeal was due to be filed with this Court on September 8, 2003. The briefing schedule in this case will not be issued until receipt of the record on appeal. Our records show no petition for writ of habeas corpus has been filed with this Court as of this date.

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts, if any, enclosed with this acknowledgment.

kb
cc:
BRADLEY M. COLLINS ✓
ALBERT HOLLAND
DEBRA RESCIGNO

---

**Supreme Court of Florida**

THURSDAY, OCTOBER 30, 2003

**CASE NO.:** SC03-1033
Lower Tribunal No.: 90-15905 CF 10A

ALBERT HOLLAND vs. STATE OF FLORIDA
Appellant(s) Appellee(s)

Appellee's motion to strike appellant's pro se motions to amend and supplement state habeas corpus petition is granted. Appellant's Pro Se Motions to Amend and Supplement State Habeas Corpus Petition filed August 7, 2003, and August 18, 2003, are hereby stricken as unauthorized without prejudice to be refiled pursuant to Florida Rule of Appellant Procedure 9.142(5)

A True Copy
Test:

/s/ Thomas D. Hall
**Thomas D. Hall**
**Clerk, Supreme Court**

kb
Served:

SUSAN BAILEY
BRADLEY M. COLLINS
ALBERT HOLLAND
DEBRA RESCIGNO

[SEAL]

**Supreme Court of Florida**

Office of the Clerk
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December 3, 2003

RE: ALBERT HOLLAND vs. STATE OF FLORIDA

CASE NUMBER: SC03-1033
Lower Tribunal Case Number: 90-15905 CF 10A

The Florida Supreme Court has received the following documents reflecting a filing date of 11/24/2003.

Letter dated November 20, 2003 – (filed by Albert R. Holland, Jr.)

In response to the above letter, please find enclosed a copy of the Motion to Strike Appellant's Pro Se "Motion to Amend and Supplement State Habeas Corpus Petition". The record on appeal was received and a briefing schedule was issued on September 15, 2003, with appellant's initial brief to be served on or before January 12, 2004.

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in

this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts, if any, enclosed with this acknowledgment.

kb
cc:
BRADLEY M. COLLINS ✓
ALBERT HOLLAND
DEBRA RESCIGNO

---

**IN THE SUPREME COURT OF FLORIDA**

**ALBERT HOLLAND,**

**Appellant,**

**vs.**

**JAMES V. CROSBY, Jr., Secretary, Department of Corrections,**

**Case No. SC04-34**

**Appellee.**

/

**MOTION TO STRIKE APPELLANT'S PRO SE "MOTION TO AMEND AND SUPPLEMENT STATE HABEAS CORPUS PETITION"**

COMES NOW Appellee, the State of Florida, by and through undersigned counsel and hereby files this "Motion to Strike Appellant's Pro Se 'Motion to Amend and Supplement State Habeas Corpus Petition,'" and as grounds therefor states:

1. Appellant, Albert Holland, is represented by Attorney Bradley M. Collins.

2. On June 9, 2003, Attorney Collins filed a "Notice of Appeal," on behalf of Appellant, appealing the trial court's denial of Appellant's motion for post-conviction relief, after evidentiary hearing.

3. On August 18, 2003, before the Record on Appeal was filed, Appellant filed a Pro Se "Motion to Amend and Supplement State Habeas Corpus Petition" alleging twenty-one claims that he wished to have supplemented into his state habeas corpus

petition. Appellant asserted that he asked his attorney to include these grounds in his state habeas corpus petition.

4. The State filed a Motion to Strike Appellant's pro se motion, arguing that it was a nullity because Appellant is represented by counsel. The State also argued that the motion was premature as Attorney Collins had not yet filed a Petition for Writ of Habeas Corpus.

5. On October 30, 2003, this Court struck Appellant's pro se motion.

6. A Petition for Writ of Habeas Corpus was filed by Attorney Collins on January 9, 2004. Appellant has now filed a **second** Pro Se "Motion to Amend and Supplement State Habeas Corpus Petition," dated January 16, 2004, alleging nineteen (19) claims that he wishes to have supplemented into his state habeas corpus petition. This second pro se motion is likewise a nullity and must be struck. "A criminal defendant has no Sixth Amendment right to represent himself and at the same time, to have the assistance of counsel." *Lewis v. State*, 766 So.2d 288, 289 (Fla. 4th DCA 2000), citing *State v. Tait*, 387 So.2d 338, 339-40 (Fla. 1980). Consequently, "pleadings filed by a criminal defendant who is represented by counsel are treated as a nullity." *Id. See also Rose v. State*, 774 So.2d 629, 637 f.n. 12 (Fla. 2000) (holding that trial court did not abuse its discretion by striking pro se motion filed by defendant who was being represented by counsel whom he had not

sought to discharge); *Jackson v. State*, 767 So.2d 1156, 1159 (Fla. 2000); *Burke v. State*, 732 So.2d 1194, 1195 (Fla. 4th DCA 1999); *Carlisle v. State*, 773 So.2d 647 (Fla. 5th DCA 2000); *Simpson v. State*, 764 So.2d 788 (Fla. 2d DCA 2000).

WHEREFORE, the State respectfully requests that this Court grant this motion, striking Appellant's pro se motion.

Respectfully submitted,

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

/s/ Debra Rescigno
DEBRA RESCIGNO
Assistant Attorney General
Florida Bar No. 0836907

DEPARTMENT OF
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(561) 837-5000 (phone)

COUNSEL FOR Appellee

[Certificate Of Service Omitted In Printing]

**Supreme Court of Florida**

WEDNESDAY, FEBRUARY 4, 2004

**CASE NOS.:** SC03-1033 and SC04-34
Lower Tribunal No.: 90-15905 CF 10A

| | | |
|---|---|---|
| ALBERT HOLLAND | vs. | STATE OF FLORIDA |
| ALBERT HOLLAND | vs. | JAMES V. CROSBY, JR., ETC. |
| Appellant/Petitioner | | Appellee/Respondent |

Appellee/Respondent's motion to strike appellant/petitioner's pro se motions to amend and supplement state habeas corpus petition is granted and Appellant/Petitioner's Pro Se Motions to Amend and Supplement State Habeas Corpus Petition filed with this Court on January 20, 2004, and January 26, 2004, are hereby stricken.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
**Thomas D. Hall**
**Clerk, Supreme Court**

kb
Served:

BRADLEY M. COLLINS
ALBERT HOLLAND
DEBRA RESCIGNO

**IN THE SUPREME COURT OF FLORIDA**

**ALBERT HOLLAND,**

**Appellant,**

**vs.**

**JAMES V. CROSBY, Jr., Secretary, Department of Corrections,**

**Appellee.** /

**Case No. SC03-1033, SC04-34**

**MOTION TO STRIKE APPELLANT'S PRO SE "MOTION TO REMOVE CONFLICT COUNSEL AND TO APPOINT COMPETENT, CONFLICT-FREE SUBSTITUTE COUNSEL"**

COMES NOW Appellee, the State of Florida, by and through undersigned counsel and hereby files this "Motion to Strike Appellant's Pro Se 'Motion to Remove Conflict counsel and to Appoint Competent, Conflict-Free, Substitute Counsel,'" and as grounds therefor states:

1. Appellant, Albert Holland, is represented by Attorney Bradley M. Collins.

2. On June 9, 2003, Attorney Collins filed a "Notice of Appeal," on behalf of Appellant, appealing the trial court's denial of Appellant's motion for post-conviction relief, after evidentiary hearing.

3. On August 7, 2003, before the Record on Appeal was filed, Appellant filed a handwritten Pro Se "Motion to Amend and Supplement State Habeas

Corpus Petition" alleging twenty-one claims that he wished to have supplemented into his state habeas corpus petition. Appellant asserted that he asked his attorney to include these grounds in his state habeas corpus petition. On August 18, 2003, Appellant filed the same pro se motion, this time typed.

4. The State filed a Motion to Strike Appellant's pro se motions, arguing that they were a nullity because Appellant is represented by counsel. The State also argued that the motions were premature as Attorney Collins had not yet filed a Petition for Writ of Habeas Corpus.

5. On October 30, 2003, this Court struck Appellant's pro se motions.

6. On January 9, 2004, Attorney Collins filed the Initial Brief in Appellant's 8.851 appeal and a Petition for Writ of Habeas Corpus. On January 20, 2004, Appellant filed another Pro Se "Motion to Amend and Supplement State Habeas Corpus Petition," in both cases, alleging nineteen (19) claims that he wished to have supplemented into his state habeas corpus petition. The State filed another "Motion to Strike" appellant's pro se pleadings, raising the same argument. This court granted the motion, striking both pleadings on February 4, 2004.

7. Appellant has now filed a "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-Free Substitute Counsel, alleging that Attorney Collins has a conflict of interest because he will not supplement the habeas petition with these nineteen

(19) claims.[1] This motion must be struck. In *Davis v. State*, 789 So.2d 978, 979-80 (Fla. 2001), this Court held that it would not accept pro se filings in which there are claims of ineffective assistance of appellate counsel, requests to dismiss appellate counsel, or which supplement bases for relief from appellants on direct appeal of a death sentence. This Court struck the pro se motion to dismiss appellate counsel that was filed in that case. *Davis* is directly on point and requires that Appellant's pro se motion to remove appellate counsel and appoint "conflict-free" counsel be struck.

WHEREFORE, the State respectfully requests that this Court grant this motion, striking Appellant's pro se motion.

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[1] Although Appellant's motion states it was served on the undersigned, the State did not learn of its existence until reviewing the on-line docketing sheet, at which point it requested and was mailed a copy by this Court.

Respectfully submitted,

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

/s/ Debra Rescigno
DEBRA RESCIGNO
Assistant Attorney General
Florida Bar No. 0836907

DEPARTMENT OF
LEGAL AFFAIRS
1515 N. Flagler Drive
9th Floor
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(561) 837-5000 (phone)

COUNSEL FOR Appellee

[Certificate Of Service Omitted In Printing]

**Supreme Court of Florida**

WEDNESDAY, May 5, 2004

**CASE NOS.:** SC03-1033 and SC04-34
Lower Tribunal No.: 90-15905 CF 10A

| | | |
|---|---|---|
| ALBERT HOLLAND | vs. | STATE OF FLORIDA |
| ALBERT HOLLAND | vs. | JAMES V. CROSBY, JR., ETC. |
| Appellant/Petitioner | | Appellee/Respondent |

Appellee/Respondent's motion to strike appellant/petitioner's pro se motion to remove conflict counsel and to appoint competent, conflict-free substitute counsel is granted and Appellant/Petitioner's Pro Se Motion to Remove Conflict Counsel and to Appoint Competent Conflict-Free Substitute Counsel filed with this Court on February 23, 2004, is hereby stricken.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
**Thomas D. Hall**
**Clerk, Supreme Court**

kb
Served:

BRADLEY M. COLLINS ✓
ALBERT HOLLAND
DEBRA RESCIGNO

[SEAL]

**Supreme Court of Florida**

Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

THOMAS D. HALL
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PHONE NUMBER (850) 488-0125
www.flcourts.org/clerk.html

May 5, 2004

RE: ALBERT HOLLAND vs. STATE OF FLORIDA

CASE NUMBERS: SC03-1033 and SC04-34
Lower Tribunal Case Number: 90-15905 CF 10A

The Florida Supreme Court has received the following document reflecting a filing date of 4/29/2004, letter filed by Albert Holland.

In response to your letter dated April 26, 2004, please be advised that we charge $1.00 per page for copies. To obtain a copy of the answer brief and response to your motion you will need to submit a check or money order in the amount of $77.00 made payable to "Clerk, Florida Supreme Court." You may also search our website address at http://www.flcourts.org/ for the answer brief that you are requesting or you may want to contact your attorney for the information you are requesting. The reply brief and reply to response are not due until June 17, 2004.

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts, if any, enclosed with this acknowledgment.

kb
cc:
BRADLEY M. COLLINS
ALBERT HOLLAND
DEBRA RESCIGNO

**IN THE SUPREME COURT OF FLORIDA**

| | | |
|---|---|---|
| **ALBERT HOLLAND,** | ) | |
| **Appellant,** | ) | |
| | ) | **CASE NO. SC 03-1033** |
| **v.** | ) | **L.T. No.** |
| **STATE OF FLORIDA,** | ) | **90-15905 CF10A** |
| | ) | |
| **Appellee.** | ) | |

**POSTCONVICTION DEFENSE COUNSEL'S RESPONSE TO APPELLANT/PETITIONER'S PRO SE MOTION TO REMOVE CONFLICT COUNSEL**

The undersigned submits the following in response to the Court's Order re Appellant/Respondent's "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-Free, Substitute Counsel," filed *Pro Se*:

1. The undersigned has diligently investigated and duly evaluated the potential postconviction claims herein, including those urged by Mr. Holland.

2. The undersigned has communicated with Mr. Holland before, during and after the 3.851 motion was filed; before, during and after evidentiary hearings; and prior to filing appellate briefs and habeas corpus pleadings on the claims which, in the undersigned's professional judgment, may be advanced in good faith.

3. Mr. Holland insists, however, that the undersigned must raise in these collateral proceedings claims which, if colorable, would comprise issues cognizable solely on direct appeal or claims refuted by the record facts and case authorities.

4. Whereas Holland claims the undersigned was "legally obligated" to make such claims in habeas proceedings, the undersigned (or any attorney for that matter) cannot ethically raise them as there is no non-frivolous basis for doing so.

5. Though Holland contends that "refusal to litigate these nineteen legal claims shows that a legal conflict exists" (*Pro Se* Motion, bottom of Page 1), a "conflict of interest" does not arise when a criminal defendant simply does not agree with counsel's strategic decisions or legal reasoning.[1] Were that the case, legions of appointed counsel would be required to withdraw for "conflict."

6. Instead, every attorney must, on their own responsibility, decide which contentions to make to

---

[1] Black's Law Dictionary (8th ed. 2004), defines "conflict of interest":

> **conflict of interest. 1.** A real or seeming incompatibility between one's private interests and one's public or fiduciary duties. **2.** A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.

the court, and may not escape that responsibility by following the client's instructions. *McNealy v. State*, 183 So.2d 738 (Fla. 1st DCA 1966).

7. The Rules Regulating the Florida Bar, moreover, strictly prohibit attorneys from raising and arguing such baseless claims.[2]

8. It is difficult to provide a meaningful response to Mr. Holland's *pro se* motion to remove him as counsel based on what Holland characterizes as a "conflict," as the undersigned (as Holland's counsel) has a duty to act, ethically, in Holland's defense, while (as an officer of the Court) proceeding in all candor.

9. As the State observed in its Response, this Court has prohibited *pro se* motions alleging ineffectiveness of counsel, urging dismissal of appellate counsel or seeking to supplement the issues. *Davis v. State*, 789 So. 2d 978 (Fla. 2001).

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[2] Rule 4-3.1 of the Rules of Professional Conduct specifically require:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

10. Though "there is no right to counsel in state collateral proceedings," *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2567 (1990), and while this Court has held "[*p*]*ro se* filings ***in direct appeals*** of capital cases in which there are claims of ineffective assistance of appellate counsel, requests to dismiss appellate counsel, or which supplement bases for relief will be docketed and then stricken," *Davis v. State*, 789 So. 2d at 981 (emphasis added), the undersigned, nonetheless, neither joins nor opposes Mr. Holland's motion to remove the undersigned as "Conflict Counsel" and expresses no preference whatsoever concerning the undersigned's continued representation of Mr. Holland, other than to assert that the issues, argument and citations of authority raised in the briefs on appeal from denial of Holland's Rule 3.851 motion and the petition for writ of habeas corpus are meritorious issues which speak for themselves, entitling Holland to relief.

Respectfully submitted,

BRADLEY M. COLLINS, P.A.
Attorney for Appellant
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301
Telephone: (954) 763-7331
Facsimile: (954) 764-5040

By: /s/ Bradley M. Collins
Bradley M. Collins
Fla. Bar No. 369438

[Certificate Of Service Omitted In Printing]

**IN THE SUPREME COURT OF FLORIDA**

**ALBERT HOLLAND,**

**Appellant,**

**vs.** **Case No. SC03-1033**

**STATE OF FLORIDA,**

**Appellee.** /

---

**ALBERT HOLLAND,**

**Petitioner,**

**vs.**

**JAMES V. CROSBY, Jr., Secretary, Department of Corrections,** **Case No. SC04-34**

**Respondent.** /

---

**RESPONSE/MOTION TO STRIKE APPELLANT'S PRO SE "MOTION TO REMOVE CONFLICT COUNSEL AND TO APPOINT COMPETENT, CONFLICT-FREE SUBSTITUTE COUNSEL"**

COMES NOW Appellee, the State of Florida, by and through undersigned counsel and hereby files this "Motion to Strike Appellant's Pro Se 'Motion to Remove Conflict counsel and to Appoint Competent, Conflict-Free, Substitute Counsel,'" and as grounds therefor states:

1. Appellant, Albert Holland, is represented by Attorney Bradley M. Collins.

2. On June 9, 2003, Attorney Collins filed a "Notice of Appeal," on behalf of Holland, appealing the trial court's denial of Holland's motion for post-conviction relief, after evidentiary hearing.

3. On August 7, 2003, before the Record on Appeal was filed, Holland filed a handwritten Pro Se "Motion to Amend and Supplement State Habeas Corpus Petition" alleging twenty-one claims that he wished to have supplemented into his state habeas corpus petition. Holland asserted that he asked Attorney Collins to include these grounds in his state habeas corpus petition. On August 18, 2003, Holland filed the same pro se motion, this time typed.

4. The State filed a Motion to Strike Holland's pro se motions, arguing that they were a nullity because Holland was represented by counsel. The State also argued that the motions were premature as Attorney Collins had not yet filed a Petition for Writ of Habeas Corpus.

5. On October 30, 2003, this Court struck Holland's pro se motions.

6. On January 9, 2004, Attorney Collins filed the Initial Brief in Holland's 3.851 appeal and a Petition for Writ of Habeas Corpus. On January 20, 2004, Holland filed another Pro Se "Motion to Amend and Supplement State Habeas Corpus Petition," in both cases, alleging nineteen (19) claims that he wished to have supplemented into his state habeas corpus petition. The State filed another "Motion to Strike" appellant's pro se pleadings, raising the same

argument. This court granted the motion, striking both pleadings on February 4, 2004.

7. Thereafter, on February 23, 2004, Holland filed a Pro Se "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-Free Substitute Counsel," alleging that Attorney Collins had a conflict of interest because he would not supplement the habeas petition with the nineteen (19) claims. The State again filed a "Motion to Strike" and the Court struck the pro se motion on May 5, 2004.

8. On June 17, 2004, Holland filed the same Pro Se "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-Free Substitute Counsel," in the Broward Circuit Court, alleging the same grounds. He also filed the motion in this Court.

9. On July 2, 2004, Judge Charles Greene denied the motion, noting the trial court was without jurisdiction pursuant to rule 9.600, Florida Rules of Appellate Procedure.

10. On July 7, 2004, this Court entered an Order requiring the parties to file a response to the motion.

11. Holland's motion must be struck. In *Davis v. State*, 789 So.2d 978, 979-80 (Fla. 2001), this Court held that it would not accept pro se filings in which there are claims of ineffective assistance of appellate counsel, requests to dismiss appellate counsel, or requests to supplement bases for relief on direct appeal of a death sentence. This Court struck the pro se motion to dismiss appellate counsel that was filed

in that case. *Davis* is directly on point and requires that Appellant's pro se motion to remove appellate counsel and appoint "conflict-free" counsel be struck.

This Court has previously struck Holland's Pro Se "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-Free Substitute Counsel," and should do so again.

WHEREFORE, the State respectfully requests that this Court grant this motion, striking Appellant's pro se motion.

Respectfully submitted,

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

/s/ Debra Rescigno
DEBRA RESCIGNO
Assistant Attorney General
Florida Bar No. 0836907

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COUNSEL FOR Appellee

[Certificate Of Service Omitted In Printing]

**Supreme Court of Florida**

FRIDAY, OCTOBER 22, 2004

**CASE NO.:** SC03-1033
Lower Tribunal No.: 90-15905 CF 10A

ALBERT HOLLAND vs. STATE OF FLORIDA
Appellant(s) Appellee(s)

Appellant's Pro Se Motion to Remove Conflict Counsel is hereby denied.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
**Thomas D. Hall**
**Clerk, Supreme Court**

kb
Served:

BRADLEY M. COLLINS
ALBERT HOLLAND
DEBRA RESCIGNO

**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO.: 06-20182-CIV-SEITZ**

**ALBERT HOLLAND,**

Petitioner,

vs.

**JAMES MCDONOUGH,**
Interim Secretary of the Florida
Department of Corrections, et. al.,

Respondent

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**RESPONSE TO PRO SE "EMERGENCY MOTION TO DISMISS CONFLICT-COUNSEL AND FOR APPOINTMENT OF CONFLICT-FREE COUNSEL" AND MOTION TO DISMISS PRO SE PETITION FOR WRIT OF HABEAS CORPUS**

(Filed Mar. 27, 2006)

COMES NOW Respondent, James McDonough, Interim Secretary, Department of Corrections, by and through undersigned counsel, and hereby responds to Petitioner's, Albert Holland's ("Holland"), ***pro se*** "Emergency Motion to Dismiss Conflict-Counsel and for Appointment of Conflict-Free Counsel," and requests that this Court dismiss Petitioner's ***pro se*** Petition for Writ of Habeas Corpus and as grounds therefor states:

1. On November 10, 2005, the Florida Supreme Court affirmed the denial of Holland's post-conviction

motion to vacate his judgment and sentence and denied Holland's petition for a writ of habeas corpus. *See Holland v. State*, 916 So. 2d 750 (Fla. 2005).

2. Holland is represented by Bradley M. Collins, who was appointed, for post-conviction purposes, on November 8, 2001, after the Office of Capital Collateral Regional Counsel – South (CCRC-South) withdrew from the case because of caseload conflict.

3. On February 8, 2006, Mr. Collins, on behalf of Holland, filed a Petition for Writ of Certiorari in the United States Supreme Court. The State filed its Response in Opposition on March 16, 2006 and the matter is still pending.

4. In the meantime, on January 24, 2006, Holland filed, ***pro se***, a Petition for Writ of Habeas Corpus in this Court. Holland did not serve the State with his petition and it does not appear that he served his attorney with the petition.

5. Thereafter, on March 13, 2006, the State received a ***pro se*** "Emergency Motion to Dismiss Conflict-Counsel and for Appointment of Conflict-Free Counsel," that had been filed by Holland.

6. On Monday, March 20, 2006, the undersigned first discovered, through a search of the Public Access information System (PACER), that Holland had filed a ***pro se*** Petition for Writ of Habeas Corpus.

7. Holland may not maintain a ***pro se*** Petition for Writ of Habeas Corpus while he has a Petition for Writ of Certiorari pending in the United States

Supreme Court. In *Feldman v. Henman*, 815 F.2d 1318, 1320 (9th Cir. 1987), the Ninth Circuit stated that "[a] district court *should not* entertain a habeas corpus petition while there is an appeal pending in [the Ninth Circuit] or in the Supreme Court." The reason for the rule, the Court noted, "is that 'disposition of the appeal may render the [habeas corpus writ unnecessary.'" *Id.* at 1320, citing *Black v. U.S.*, 269 F.2d 38, 41 (9th Cir. 1959). It is "appropriate for the district court to decline to address the merits of a petition when review of the conviction is pending before the Supreme Court, as in *Nemec* [*v. U.S.*, 184 F.2d 355 (9th Cir. 1950)], since neither the district court nor [the federal appellate] court can treat such petitions for review as abandoned. *Feldman*, at 1321. *See also Hubbart v. Knapp*, 2002 U.S. Dist. LEXIS 1990 (N.D. Cal. 2002) (dismissing a petition for writ of habeas corpus without prejudice because the petitioner had a petition for writ of certiorari pending in the U.S. Supreme Court); *U.S. v. Wolfson*, 340 F. Supp. 968, 971 (D. Del. 1972) (holding § 2255 motion to vacate a judgment of conviction was properly denied where there was a petition to the Supreme Court for certiorari pending at the time the motion was filed).

8. The State notes that Holland's ***pro se*** Petition for Writ of Habeas Corpus was filed before the Petition for Writ of Certiorari; however, under *Faretta v. California*, 422 U.S. 806 (1975), defendant does not have a right to "hybrid" representation – that is, he does not have the right to proceed pro se while he is

simultaneously being represented by a lawyer. *See also Cross v. U.S.*, 893 F.2d 1287, 1291-92 (11th Cir. 1990) (the Eleventh Circuit "has held repeatedly that an individual does not have a right to hybrid representation."); *Bourdon v. Loughren*, 386 F.3d 88, 100 (2d Cir. 2004) (noting that "a defendant does not necessarily have a constitutional right to hybrid representation"); *U.S. v. Chavin*, 316 F.3d 666, 671 (7th Cir. 2002) (recognizing, "along with all the circuits that have considered the question, that there is no Sixth Amendment right to hybrid representation") (citations omitted). While district courts have discretion to allow hybrid representation, it is to be used sparingly. *U.S. v. Washington*, 434 F.3d 7 (1st Cir. 2006).

9. Because Holland does not have a right to hybrid representation, his ***pro se*** Petition for Writ of Habeas Corpus, filed while he was being represented by Mr. Collins is a nullity. Consequently, the fact that it was filed before the Petition for Writ of Certiorari is of no consequence, it should be dismissed.

10. Moreover, regarding Holland's ***pro se*** "Emergency Motion to Dismiss Conflict-Counsel and for Appointment of Conflict-Free Counsel," the State notes that Mr. Collins was appointed as Holland's attorney by state court pursuant to section 27.10, Florida Statutes (2006). Attorneys so appointed agree to continue representing the capital defendant "until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court." Section 27.10(3), Florida Statutes

(2006), authorizes registry attorneys to represent their capital defendants in federal court, but they are not compensated by the state for that representation. The attorney must seek compensation from the federal government, as provided by 18 U.S.C. s.3006A. Since Mr. Collins was appointed by the state court and can only withdraw if so permitted by that court, the State recommends that any motion to discharge counsel be referred to the appropriate state court.

11. The State respectfully reserves the right to raise any procedural/substantive arguments it has regarding the ***pro se*** Petition for Writ of Habeas Corpus in any Response ordered by this Court.

WHEREFORE, based upon the foregoing, Respondent respectfully requests that this Honorable Court enter an order Dismissing Holland's ***Pro Se*** Petition for Writ of Habeas Corpus and referring the "Emergency Motion to Dismiss Conflict-Counsel and for Appointment of Conflict-Free Counsel," to the state court.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

/s/ Debra Rescigno
DEBRA RESCIGNO
Assistant Attorney General

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Counsel for Respondent

[Certificate Of Service Omitted In Printing]

**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

**ALBERT HOLLAND,**

Petitioner,

v. Case No. 06-20182-CIV-SIETZ

**JAMES MCDONOUGH, ET. AL.,**

Respondent. /

## PETITIONER'S APPENDIX

(Filed Nov. 22, 2006)

**COMES NOW THE PETITIONER,** by and through his undersigned CJA counsel, and herein submits the attached Appendix to his Reply. This Court previously permitted Petitioner to conventionally file this Appendix.

Respectfully submitted,

/s/ Todd G. Scher

TODD G. SCHER
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue #15-B
Miami Beach, FL 33140
(305) 861-9252 (tel)
(305) 861-9253 (fax)
CJA Counsel for Petitioner

[Certificate Of Service Omitted In Printing]

# APPENDIX B

LAW OFFICES
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**600 SOUTH ANDREWS AVENUE**
**SUITE 500**
**FORT LAUDERDALE, FLORIDA 33301**

---

**TELEPHONE (954) 763-7331**
**TELEFAX (954) 764-5040**
**E-MAIL: bmcdefense@aol.com**

Mr. Albert Holland, Jr.
#122651
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-4410

Dear Mr. Holland:

I received a copy of your May 30, 2002 letter to Judge Greene detailing the particular documents (out of the literally thousands of documents the State must also attempt to pick through) which you believe are important to our motion for post-conviction relief. Unfortunately, Judge Greene was required to turn your letter over to the State Attorney's Office. Revealing our legal strategy, the "focus" of our efforts, or other attorney-client privileged matters, will not help our case.

While we will send you copies of these particular documents should you continue to insist, we are concerned that their getting into the wrong hands could be disastrous, as it actually has for others in your position. Please also understand that retrieving,

verifying, copying and mailing numerous documents, or struggling over any clearly untenable claims will, of course, only cause us to delay our efforts in your behalf.

Our post-conviction motion must be presented convincingly to Judge Greene and, later, to the state supreme and federal courts. In the final analysis, the judiciary's view of one or two legal issues will determine whether we win or lose and this has little to do with the number of claims we raise. It has more to do with the quality of our work and what we do *not* argue. While it is important to exhaust all of our tenable and strategically advisable claims in State court, the notion that raising grounds which could have been, should have been, or actually were raised on direct appeal (which cannot be raised by post-conviction motion), or grounds which lack a reasonable chance of succeeding in state or federal court would only serve to water-down our solid issues.

I would like to reassure you that we are aware of state time-limitations and federal exhaustion requirements, and that your post-conviction motion is being researched, investigated and prepared in a thorough and thoughtful manner. Though we have "focused" our investigation on the mitigating evidence never presented at trial, we are also researching and carefully including or excluding certain guilt-phase issues. Again, a post-conviction motion is not a second appeal. Only certain types of issues can be raised in a post-conviction motion and – even among those we are allowed to raise – only certain types of claims

have a realistic chance of resulting in relief at the state or federal levels.

When we have developed a first draft of the motion, you will certainly receive a copy. If there are some issues we disagree on, and you insist, we will make sure you have an opportunity to file a supplemental motion in order to add them. It is vital that you understand the importance of maintaining a spirit of cooperation. You should not discuss your case with anyone outside my office, no matter how well-meaning. Our trust and confidence in one another is essential.

We have already obtained over 40 boxes of documents in your case in addition to documents on CD Rom, audio and video recordings. On June 5, 2002, Judge Greene granted our motion to unseal 14 more boxes of records for which the State had claimed secrecy under the state public records laws.

I am enclosing an Authorization for Release of Medical Records. Please sign all copies before a Notary and return them as soon as possible so we can obtain the medical records also contained in a couple of those boxes. I hope to see you again in the next couple of months.

Sincerely,

/s/ Bradley M. Collins
Bradley M. Collins, Esquire

Encl.

# APPENDIX C

LAW OFFICES
**BRADLEY M. COLLINS, P.A.**
**600 SOUTH ANDREWS AVENUE**
**SUITE 500**
**FORT LAUDERDALE, FLORIDA 33301**

---

**TELEPHONE (954) 763-7331**
**TELEFAX (954) 764-5040**

December 23, 2002

Mr. Albert Holland, Jr.
#122651
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-4410

Dear Mr. Holland:

Subsequent to the Court's Order striking your pro se "Motion to Supplement the Record on Appeal" as a nullity, my office has thoroughly researched, analyzed and reevaluated the thirteen grounds you believed would entitle you to relief. Please understand that your case is not "on appeal." As previously explained, neither Rule 3.850 nor 3.851 provide for a second direct appeal of your conviction or sentence. Instead, they provide for a post-conviction collateral attack of your judgment and sentence. As such, much of the case law applicable to cases pending on direct appeal is not directly applicable to a case in the present posture. Nonetheless, the grounds stated in your "Motion to Supplement the Record on Appeal" were as follows:

1. Double Standard the Courts Used to Deny Me My Right to Self Representation;

2. Denial of Substitute Counsel;

3. Conflict of Interest;

4. Ineffective Assistance of Counsel Based on Improper Conviction of Attempted Sexual Battery;

5. Ineffective Assistance of Counsel for Failing to Object to the Trial Judge's "Amendment" of the Indictment to Remove Attempted Felony Murder;

6. Ineffective Assistance of Counsel for Failing to Move to Suppress Identification;

7. Jackson v. Denno: Conviction Based in Part on Involuntary Confession;

8. Doyle v. Ohio: Improper Impeachment with Defendant's Failure to Give Statement at Time of Miranda Warnings;

9. The Prosecutor's Exclusion of Qualified Jurors on the Basis of Race;

10. Ake v. Oklahoma Claim;

11. Ineffective Assistance of Counsel for Failure to Move to Sever Offenses;

12. Ineffective Assistance of Counsel for Failure to Raise and Argue That the Prosecution Did Not Prove its Case Beyond a Reasonable Doubt; and

13. Admission of the Statements to Detective Butler.

In short, only one facet of the foregoing issues is cognizable in a motion for post-conviction relief, and that issue (ineffective assistance of counsel for failing to properly investigate) is already included in our motion for post-conviction relief.

First, issues concerning your right to self-representation, which were raised in the trial court prior to and during trial, are matters which must be addressed, not by motion for post-conviction relief pursuant to Rule 3.850 or 3.851, but on direct appeal. Such issues are not cognizable in a motion for post-conviction relief. Denial of substitute counsel, also previously raised in the trial court, is likewise an issue for direct appellate review. A "conflict of interest" arises when an attorney experiences conflicting interests in properly representing the client. Differences in legal strategy or opinion between the client and the attorney do not constitute a "conflict of interest." Though you were not charged with attempted sexual battery, attempted sexual battery is a lesser-included offense of sexual battery. The jury may be instructed on this lesser included defense and may convict you of it, though you were formally charged with the choate crime of sexual battery. Also, the indictment did not charge attempted felony murder. Therefore, whether Judge Greene "amended" your indictment to remove that "element," or whether your attorneys were ineffective for failing to object to such "removal," is academic.

Any contention that counsel was ineffective for failing to move to suppress eyewitness identifications has no basis. Eyewitnesses are permitted to identify the subject of their testimony and the prosecutor is permitted to point to the defendant in the courtroom. The voluntariness of your statements to police, also raised prior to and during trial, is not a cognizable ground for post-conviction relief. Thus, *Jackson v. Denno* is inapplicable. Whether counsel was ineffective for failing to object to the State's impeachment of your trial testimony using matters omitted from your post-*Miranda* statement to police is not a viable ground for post-conviction relief as you did not remain silent at the time of your arrest or immediately after you were *Mirandized*.

The exclusion of qualified jurors on the basis of race is an issue cognizable on direct appeal, not by post-conviction relief, even if such a claim is cast as one for ineffective assistance of counsel. The same is true of an Ake v. Oklahoma claim. Trial counsel's failure to move for severance of offenses is not a viable claim in the present case, as your trial attorneys did move to sever the offenses. The trial court's order denying severance of offenses was an issue for direct appeal, not postconviction relief. Your claim of ineffective assistance of trial counsel, based on counsel's failure to investigate, has some merit. That issue, however, is contained in and covered by Claims III and VIII of our motion. Concerning your confession to Detective Butler, it is not necessary that the State introduce your statement as impeachment evidence.

Such statements are admissible under the adverse party exception to the hearsay rule and were properly introduced into evidence. To the extent your proposed issues complain of ineffective assistance of counsel on direct appeal they are not cognizable at all in a motion for postconviction relief, but in a petition for writ of habeas corpus. The Rules of Criminal Procedure, the statutes and case authorities all require that such a petition be filed simultaneously with any appeal of a denial of postconviction relief in the trial court.

Please understand that many of the issues have raised in your Motion to Supplement the Record on Appeal remain viable in a petition for writ of habeas corpus in the Florida Supreme Court, should your Motion for Post-Conviction Relief be denied. That petition will most likely be filed concurrently with any such appeal. Also, should the Florida Supreme Court deny both your Motion for Postconviction Relief and your state Petition for Writ of Habeas Corpus, and should the United States Supreme Court deny any petition for writ of certiorari, your appellate claims, your postconviction relief claims, and your state habeas corpus claims will then be ripe for presentation in a petition for writ of habeas corpus in federal court. Should your federal petition for writ of habeas corpus subsequently be denied, such a ruling would then be appealed to the United States Court of Appeals for the Eleventh Circuit, in Atlanta, Georgia. Should the Eleventh Circuit subsequently affirm the District Court, we would then seek certiorari in the

United States Supreme Court. Of course, it is possible that we obtain relief at some point along this journey through the judicial branch. It is difficult to predict what might, or might not, happen along the way.

In the meantime, it is important that we have your complete confidence and support as we litigate your case to the state and federal trial and appellate courts. Rest assured, Mr. Holland, that we will assert each and every one of your viable legal claims in order to enforce your substantive and procedural constitutional rights to the fullest extent of the law.

We wish you the best of holidays under your present circumstances, and express our hopes for a productive New Year.

Sincerely,

/s/ Bradley M. Collins
Bradley M. Collins

Enclosure

# APPENDIX F

LAW OFFICES
BRADLEY M. COLLINS, P.A.
600 SOUTH ANDREWS AVENUE
SUITE 500
FORT LAUDERDALE, FLORIDA 33301

TELEPHONE (954) 763-7331
TELEFAX (954) 764-5040

January 22, 2003

Mr. Albert Holland, Jr.
#122651
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-4410

Dear Mr. Holland:

Thank you for your letter of January 12, 2003. We had a *Huff* hearing on January 6, 2003, at which we requested an evidentiary hearing before Judge Greene. Though there is no right for a post-conviction movant to attend a *Huff* hearing, you do have a right to be present at an evidentiary hearing, if ordered, wherein evidence will be taken in support of, and in opposition to, our claims.

We are particularly interested in Claim III (ineffective assistance of counsel during closing argument by conceding guilt without your authority to the offense of attempted first-degree murder). This claim is of particular interest not only because the jury which ultimately convicted you and recommended

that you receive the death penalty was told that you were confessing you purposely intended to kill Ms. Johnson, but also because jurors may have found you guilty of the first-degree murder of Officer Winters based on a felony murder theory involving the predicate offense of attempted first-degree murder.

The next step is for Judge Greene to decide whether to order an evidentiary hearing. If and when Judge Greene orders an evidentiary hearing, I will inform you immediately. If an evidentiary hearing is ordered, we will, at that point, have a rather important issue to discuss. If Judge Greene enters an order denying our requests, we will prepare the proper appeals. I trust we can move forward with your confidence and a sense of unity in approaching this very delicate matter. I am enclosing an extra copy of the State's Response to our Motion to Vacate Judgment and Sentence. Wishing you the best under the circumstances.

Sincerely,

/s/ Bradley M. Collins
Bradley M. Collins

Enclosure

## APPENDIX G

[Can Be Found In The Joint Appendix,
Volume II, p. 206-208]

# APPENDIX H

[LOGO]

**THE FLORIDA BAR**
CYPRESS FINANCIAL CENTER, SUITE 835
5900 NORTH ANDREWS AVENUE
FT. LAUDERDALE, FL 33309

**JOHN F. HARKNESS, JR.** **954/772-2245**
EXECUTIVE DIRECTOR WWW.FLABAR.ORG

August 20, 2003

**PERSONAL/FOR ADDRESSEE ONLY**

Albert Holland, Jr.
DOC# 122651
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-4440

RE: Complaint against Bradley Michael Collins
TFB Case No. 2004-50,193(17A)

Dear Mr. Holland:

I have completed my review of your complaint, and all documents appended to it. As the issue you raise does not rise to the standard of a violation of The Rules Regulating The Florida Bar, I am unable to initiate a Florida Bar investigation.

The gravamen of your complaint is your belief that Mr. Collins compromised your post-conviction rights by failing to include, in his pleadings, issues and arguments you directed him to advance. As proof of Mr. Coffins' misconduct, you provided The Florida Bar with copies of the pro se motion you filed, to

supplement the record, which was declared a nullity by the Court.

The Florida Bar finds no ethical violation in your complaint for several reasons. First, because The Rules Regulating The Florida Bar do not require attorneys in criminal cases to follow clients' instructions regarding technical and legal tactics in advancing a defense. *See* Comment to R. Regulating Fla. Bar 4-1.2. Further, you have provided no evidence to support your charge that Mr. Collins failed to consider and pursue your objectives in the pleadings that he did file for you. Finally, The Florida Bar noted that your pro se pleading failed not because of anything which Mr. Collins did, or failed to do. Rather, it failed because it was procedurally incorrect as a matter of law.

Based on the foregoing, and because I find no other basis for ethical inquiry, I have dismissed your complaint and directed that The Florida Bar's file on this matter be closed. Please note that The Florida Bar will keep a copy of this file for one (1) year. After that time our file will be destroyed. It is advantageous to you and the attorney who is the subject of this complaint to keep a ***complete*** copy of this file in the event you should ever need to reference the same again.

Very truly yours,

/s/ Lorraine C. Hoffmann
Lorraine Christine Hoffmann
Assistant Staff Counsel

LCH/la

cc: Brady Michael Collins (w/ copy of Mr. Holland's Inquiry/Complaint Form)

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## APPENDIX K

[Can Be Found In The Joint Appendix,
Volume II, p. 209-210]

## APPENDIX L

[Can Be Found In The Joint Appendix,
Volume II, p. 211-212]

# APPENDIX O

**STATE OF FLORIDA**
**DEPARTMENT OF CORRECTIONS**
**(Instructions on Back)**

**INMATE REQUEST**

Mail Number: _____
Team Number: _____
Institution: _____

**TO: (Check One)**

☐ Warden
☐ Asst. Warden
☐ Classification
☐ Security
☐ Medical
☐ Dental
☑ Other [Administrative]

[Sergeant Oventrop]

| | | | |
|---|---|---|---|
| **FROM:** | Inmate Name<br>Albert Holland | DC Number<br>122-651 | Job Assignment |
| | | Quarters<br>P6210 | Date<br>3-7-06 |

**REQUEST**

Dear Sergeant Oventrop: How are you? Fine I hope.

On November 10, 2005 the Florida Supreme Court denied my appeals. My attorney Mr. Bradley M. Collins, P.A. 600 South Andrews Avenue, Suite 500, Ft. Lauderdale, Florida may say that he called me on the telephone to inform me of the court's ruling. Would you check records to see if my attorney called me between November 10, 2005 and December 1, 2005? When you have the time?

Thank you

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

**DO NOT WRITE BELOW THIS LINE**

**RESPONSE** **DATE RECEIVED:** 03/08/06

I have checked the legal call records for November 2005 and have no record of you being on the phone.

The following pertains to informal grievances only:

Based on the above information, your grievance is . (Returned, Denied, or Approved). If your informal grievance is denied, you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.)

| Official (Signature): EC Oventrop, [Illegible] | Date: 03/08/06 |
|---|---|

Distribution:
White – Returned to Inmate
Canary – Returned to Inmate
Pink – Retained by official responding, or if the response is to an informal grievance then forward to be placed in inmate's file.

# APPENDIX P

**Supreme Court of Florida**
Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

THOMAS D. HALL
CLERK
DEBBIE CAUSSEAUX
CHIEF DEPUTY CLERK
GREGORY J. PHILO
STAFF ATTORNEY

PHONE NUMBER
(850) 488-0125
www.flcourts.org/clerk.html

December 28, 2005

RE: ALBERT HOLLAND vs. STATE OF FLORIDA

CASE NUMBER: SC03-1033
Lower Tribunal Case Number: 90-15905 CF 10A
Lower Tribunal Filing Date: 6/2/03

The Florida Supreme Court has received the following documents reflecting a filing date of 12/8/2005 – Letter dated December 21, 2005 RE: Mandate issued in SC89922.

In response to your letter dated December 21, 2005, please be advised that you will need to contact the Florida State Archives, Reference Department, R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250, as the court has relinquished custody of this case file.

kb
cc:
ALBERT HOLLAND

**APPENDIX Q**

[Can Be Found In The Joint Appendix, Volume II, p. 213-214]

# APPENDIX S

[SEAL]

FLORIDA DEPARTMENT OF STATE
**Sue Cobb**
Secretary of State
DIVISION OF LIBRARY AND
INFORMATION SERVICES

Albert Holland, Jr., DOC #122-651, P5210
Union Correctional Institution
7819 NW 228th St.
Raiford, FL 32026-4450

RE: Mandate, FSC case #89,922

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Dear Researcher:

The material or information requested:

1. [X] Is enclosed.

2. [ ] May be copied upon receipt of your check in the amount of [$ ], made payable to the Department of State.

3. [ ] May be available in our collections. Because of staff and time limitations or the complexity of this request, this cannot be completed by mail. The staff is unable to conduct research into microfilmed collections, unindexed books, or large unindexed collections. You may wish to hire a private researcher from the enclosed list.

4. [ ] Could not be located in our collections.

5. [ ] May be available from the National Archives, 8th Street and Pennsylvania Ave., N.W., Washington, D.C. 20408.

6. [ ] May be available from the National Personnel Records Center, GSA, 9700 Page Blvd., St. Louis, Mo 63132.

7. [ ] Official Florida birth, death, and marriage records may be obtained from the Department of Health, Office of Vital Statistics, P.O. Box 210, Jacksonville, FL 32231-0042.

8. [ ] The Genealogical Collection of the Florida State Archives is non-circulating, and the Archives does not participate in interlibrary loan programs. Your local library may be able to obtain this material through another source. Census records can be obtained from the National Archives' Census Microfilm Rental Program, P.O. Box 30, Annapolis Junction, MD 20701-0031.

9. [ ] Other:

Researchers are encouraged to visit the Archives in person to conduct their research, particularly if they have extensive or complicated requests. The Archives is open Monday-Friday from 8:00 a.m. to 5:00 p.m. and Saturday from 9:30 a.m. to 3:30 p.m. (Closed for state holidays and holiday weekends.) Visit our web page at <http://dlis.dos.state.fl.us/barm/>.

January 27, 2006

Archives staff

Address correspondence to:

Florida State Archives
R.A. Gray Building (M.S. 9A)
500 South Bronough Street
Tallahassee, FL 32399-0250

Form LS5P821R10-93

❑ STATE LIBRARY OF FLORIDA
R.A. Gray Building • Tallahassee, Florida
32399-0250 • (850) 245-6600 FAX: (850) 488-2746
• TDD: (850) 922-4085 • **http://www.dos.state.fl.us**
❑ LEGISLATIVE LIBRARY SERVICE
(850) 488-2812 • FAX: (850) 488-9879
❑ RECORDS MANAGEMENT SERVICES
(850) 245-6750 • FAX: (850) 245-6795
❑ FLORIDA STATE ARCHIVES
(850) 245-6700 • FAX: (850) 488-4894
❑ ADMINISTRATIVE CODE AND WEEKLY
(850) 245-6270 • FAX: (850) 245-6282

**MANDATE**

**SUPREME COURT OF FLORIDA**

*To the Honorable, the Judges of the:*

**Circuit Court in and for Broward County, Florida**

*WHEREAS, in that certain cause filed in this Court styled:*

**ALBERT HOLLAND** vs. **STATE OF FLORIDA**

*Case No.:* **SC89922**

*Your Case No.:* **90-15905**
**CF10A**

*The attached opinion was rendered on:* **10/05/2000**

*YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.*

*WITNESS, The Honorable CHARLES T. WELLS, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 19th day of January, 2001.*

[SEAL] /s/ Thomas D. Hall
***Clerk of the Supreme Court of Florida***

**Supreme Court of Florida**

WEDNESDAY, DECEMBER 20, 2000

**CASE NO.:** SC89922
Lower Tribunal No.: 90-15905 CF10A

ALBERT HOLLAND vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

tc
Served:

HON. MICHAEL J. SATZ
RICHARD B. GREENE
LESLIE CAMPBELL
HON. ED KENNEDY, CLERK
HON. CHARLES M. GREENE, JUDGE

# APPENDIX U

**STATE OF FLORIDA**
**DEPARTMENT OF CORRECTIONS**

**INMATE REQUEST**

Mail Number: _____
Team Number: _____
Institution: _____

**(Instructions on Back)**

---

**TO: (Check One)**

☐ Warden
☐ Asst. Warden
☐ Classification
☐ Security
☐ Medical
☐ Dental
☑ Other Administrative Sergeant

| | Inmate Name | DC Number | Quarters | Job Assignment | Date |
|---|---|---|---|---|---|
| **FROM:** | Albert Holland | 122-651 | P5210 | | 1-19-06 |

**REQUEST**

Dear Mr. Oventrop: How are you? Fine I hope.

Would you please permit me to make a Legal phone call to my appellate attorney:

Bradley M. Collins, P.A.
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301

Telephone (954) 763-7331
Telefax (954) 764-5040

Please allow me to call at 9:00-10:00 a.m. It's important!! Thanks.

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

**—— DO NOT WRITE BELOW THIS LINE ——**

**RESPONSE** **DATE RECEIVED:** 01/20/06

| |
|---|
| approved |

**[The following pertains to informal grievances only:**

**Based on the above information, your grievance is _____. (Returned, Denied, or Approved). If your informal grievance is denied, you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.]**

Official (Signature):
/s/ EC Oventrop SGT Date: 01/20/06

Distribution:

White – Returned to Inmate
Canary – Returned to Inmate
Pink – Retained by official responding, or if the response is to an informal grievance then forward to be placed in inmate's file.

DC6-236 (Revised 8-00)

**APPENDIX V**

[Can Be Found In The Joint Appendix,
Volume II, p. 215-216]

**APPENDIX W**

[Can Be Found In The Joint Appendix,
Volume II, p. 217-218]

**APPENDIX X**

[Can Be Found In The Joint Appendix,
Volume II, p. 219-220]

# APPENDIX Y

LAW OFFICES
BRADLEY M. COLLINS, P.A.
600 SOUTH ANDREWS AVENUE
SUITE 500
FORT LAUDERDALE, FLORIDA 33301

TELEPHONE (954) 763-7331 E-MAIL: bmcdefense@aol.com
FAX (954) 765-5040 WEBSITE: bradleymccollins.com

January 31, 2006

Mr. Albert Holland, Jr.
#122651
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-4410

Dear Mr. Holland:

I am in receipt of your letter dated January 20, 2006 concerning operation of AEDPA time limitations. One hurdle in our upcoming efforts at obtaining federal habeas corpus relief will be that the one-year statutory time frame for filing such a petition began to run after the case was affirmed on October 5, 2000. The Judgment and Sentence imposed after retrial were affirmed by the Florida Supreme Court. However, it was not until November 7, 2001, that I received the Order appointing me to the case. As you can see, I was appointed about a year after your case became final. It was then necessary to obtain additional public records in order to investigate your case.

Whereas these facts may ultimately form the basis for an argument that the AEDPA's statute of limitations was equitably tolled for the period in which you had not yet been appointed adequate counsel through no fault of your own, you are correct that a petition for writ of certiorari to the United States Supreme Court will not toll the AEDPA time-period. This is especially true since that period had run before my appointment and therefore before your Rule 3.850 motion was filed. Nonetheless, I believe the *Nixon* issue (counsel's unauthorized concession of guilt) was decided by the Florida Supreme Court in a manner contrary to the decisions of the Supreme Court of the United States.

Since that is our only technically timely remedy until we can make the equitable tolling argument, and because, moreover, doing so will have no effect on the viability of the federal habeas corpus remedy, we should certainly move forward with seeking review at the Supreme Court level. Doing so will have no effect on our present efforts to prepare and finalize your habeas corpus petition, advancing the equitable tolling argument conjointly with your requests for relief on the merits.

Enclosed please find a copy of the Petition for Writ of Certiorari filed today.

Please contact me after you have had a chance to review same.

Very truly yours,

/s/ Bradley M. Collins
Bradley M. Collins

enclosures

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**APPENDIX Z**

[Can Be Found In The Joint Appendix,
Volume II, p. 221-223]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
CASE NO. 06-20182-CIV-SEITZ

ALBERT HOLLAND, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent. /

**ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY FILED**

THIS MATTER is before the Court on Respondent State of Florida's (the "State") Response to Order to Show Cause [DE-14], in which it argues that Petitioner's application for a writ of habeas corpus [DE-1] is untimely and should be dismissed. Petitioner filed a reply [DE-35], arguing that his petition is timely under a theory the United States Supreme Court recently rejected and asking the Court to apply equitable tolling, in any event. The Court allowed the State to file a sur-reply responding to Petitioner's equitable tolling argument. Upon review of the record, the applicable law, and the pertinent facts of this case, the Court finds that Petitioner's application for habeas relief is untimely and should not be equitably tolled.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On or about August 16, 1990, Petitioner Albert Holland was indicted in Broward County, Florida, on four counts – including first-degree premeditated murder. A jury convicted him on all four counts, and he was sentenced to death on the first-degree murder count, life imprisonment for sexual battery, 40 years for attempted first-degree murder, and 17 years for armed robbery. On appeal, the Florida Supreme Court reversed the convictions and remanded the case for a new trial. *See generally Holland v. State*, 636 So. 2d 1289 (Fla. 1994).

On retrial, another jury found Petitioner guilty.[1] Once again, the trial court sentenced Petitioner to death on the first-degree murder count. This time, on appeal, the Florida Supreme Court affirmed Petitioner's conviction and death sentence, and the United States Supreme Court denied *certiorari* on October 1, 2001. *See generally Holland v. State*, 773 So. 2d 1065 (Fla. 2000), *cert. denied*, 534 U.S. 831 (2001).

On or about September 19, 2002,[2] 353 days later, Petitioner filed his application for state

---

[1] On the sexual battery count, a jury found Petitioner guilty of the lesser offense of attempted sexual battery.

[2] The State has identified this date as the date on which Petitioner filed his state-court motion. Petitioner has identified September 17, 2002 as the date on which he filed his state-court motion.

post-conviction relief, which tolled the one-year time limit for filing his federal habeas petition under 28 U.S.C. § 2254. The court denied relief, and on appeal, the Florida Supreme Court affirmed this decision. *See generally Holland v. State*, 916 So. 2d 750 (Fla. 2005). The mandate issued on December 1, 2005. Petitioner then sought review of the denial of state post-conviction relief in the United States Supreme Court. The United States Supreme Court denied *certiorari* on April 17, 2006. *See generally Holland v. Florida*, 126 S. Ct. 1790 (2006). In the meantime, on January 19, 2006, Petitioner, acting *pro se*, filed the present federal habeas petition.

## II. DISCUSSION

### A. The Pendency of a *Cert* Petition in the United States Supreme Court Does Not Toll the One-Year Time Limit for Filing a Federal Habeas Petition Under § 2244.

A prisoner in state custody has one year to seek federal habeas corpus relief once his state court judgment of conviction becomes final. *See* 28 U.S.C. § 2244(d). The judgment becomes final when "the Supreme Court has had an opportunity to review the case or the time for seeking review has expired." *Coates v. Byrd*, 211 F.3d 1225, 1226 (11th Cir. 2000) (citing *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir.1999)). Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled for the time during which "a properly filed application for state post-conviction or

other collateral review with respect to the pertinent judgment or claim is pending."

Petitioner's judgment and conviction became final on October 1, 2001. Petitioner filed his application for state post-conviction relief 353 days later, on September 19, 2002. The filing of his state habeas petition stopped the clock temporarily. Once the Florida Supreme Court issued its mandate on December 1, 2005, affirming the denial of state habeas relief, Petitioner had just 12 more days – until December 13, 2005 – to file his federal habeas petition. Petitioner did not file his federal petition until more than a month later, on January 19, 2006.

Petitioner had argued to this Court that the filing and pendency of his *cert* petition in the United States Supreme Court tolled his one-year time limit for filing his federal habeas petition. The parties had been awaiting a decision from the United States Supreme Court on this very question. On February 20, 2007, the United States Supreme Court squarely held that the time during which a *cert* petition is pending does *not* toll the one-year statute of limitations pursuant to 28 U.S.C. § 2244(d). *Lawrence v. Florida*, 127 S. Ct. 1079, 1081 (2007). Thus, Petitioner's first argument fails.

### B. Equitable Tolling Is Not Warranted in This Case.

Although the United States Supreme Court has yet to decide whether the doctrine of equitable tolling

applies to extend the one-year limitations period set forth in 28 U.S.C. § 2244, the Eleventh Circuit has held that it does. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Id.* A district court can allow equitable tolling where a movant files a habeas petition untimely "because of extraordinary circumstances that are *both* beyond his control and unavoidable even with diligence." *Id.* (quoting *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)) (emphasis added). However, this should be done only in "rare and exceptional circumstances," such as when the State's conduct prevents timely filing. *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005) *aff'd*, 127 S. Ct. 1079 (2007); *see also Arce v. Garcia*, 400 F.3d 1340, 1349 (11th Cir. 2005) (noting that, in order to invoke equitable tolling, "courts usually require some affirmative misconduct").

Petitioner bears the burden of establishing his entitlement to this extraordinary remedy. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286 (11th Cir. 2002), *overruled in part on other grounds by Sykosky v. Crosby*, 187 Fed. Appx. 953 (11th Cir. 2006). Here, Petitioner posits five arguments for equitable tolling: (1) the Florida Supreme Court's failure to oversee his former State-appointed attorney, Bradley M. Collins,

Esq.;[3] (2) the Florida Supreme Court's Clerk's Office's failure to inform him that mandate had issued in his post-conviction appeal; (3) the Department of Corrections' ("DOC") "refusal" to allow him access to the "Writs" room; (4) Collins' failure to keep him informed of the status of his case and to timely file the federal habeas petition; and (5) his long history of mental illness, which prevented him from timely filing his petition. As shown below, all of these arguments lack merit.

1. The Florida Supreme Court's failure to oversee Collins

Petitioner claims that the Florida Supreme Court's failure to oversee Collins' efforts should allow for equitable tolling. Petitioner is incorrect. This does not constitute an extraordinary circumstance warranting equitable tolling. *See Lawrence*, 421 F.3d at 1226 (State's provision of an inadequate or incompetent attorney is not a basis for equitable tolling).

2. The Florida Supreme Court's failure to inform him that mandate had issued

Petitioner next argues that the Florida Supreme Court's failure to advise him that mandate had issued in his post-conviction appeal likewise should allow for

---

[3] Collins was appointed for post-conviction purposes when the Office of Capital Collateral Regional Counsel – South withdrew from Petitioner's case because of caseload conflict.

equitable tolling. This argument also misses its mark. Petitioner's situation is distinguishable from the scenario in *Knight v. Schofield*, 292 F.3d 709, 710-11 (11th Cir. 2002), in which the Clerk of the Georgia Supreme Court specifically assured inmate Knight that he would be notified as soon as a decision in his case issued, but inadvertently sent notice of the decision to the wrong person. Knight showed diligence by trying to contact the Clerk when he never received a response. *Id.* at 711. Accordingly, the Eleventh Circuit reversed the district court's denial of equitable tolling, finding that "[u]ntil the clerk responded, Knight had no way of knowing that his state remedies had been exhausted." *Id.* at 711.

Here, Petitioner never argues that someone in the Clerk's Office promised to inform him of the outcome of his case. Further, there is no evidence that Petitioner ever contacted the Florida Supreme Court to request a copy of its decision and/or mandate denying post-conviction relief. Petitioner did contact the Florida Supreme Court for other reasons, though – for example, (1) to seek Collins' removal as his attorney (*i.e.*, Feb. 23 and June 17, 2004); and (2) to request copies of various pleadings, other court filings, and dates of Orders (*i.e.*, Nov. 17 and Nov. 24, 2003; Jan. 23, Apr. 29, and Aug. 26, 2004). (Pet'r's App. [DE-38] I and J.) Just as Petitioner directly sought to have the Florida Supreme Court send him certain information, he could have asked it to send

him notice of the mandate denying state post-conviction relief.[4]

3. The DOC's alleged refusal to allow Petitioner access to the "Writs" room

Petitioner alleges that the DOC denied him access to the "Writs" room, and that this should serve

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[4] In his reply, Petitioner notes, without any evidentiary support, that he contacted the Florida Supreme Court in October 2005 to determine how to find his case on its website so that he could "secure the assistance of outside supporters to keep him updated about the appeal." (Pet'r's Reply [DE-35] at 18). He has only filed in the record copies of certain pages of the website apparently sent to him, without offering any evidence to show that he needed the website to secure "outside supporters." (Pet'r's App. N.) He also does not discuss what efforts he made to find such "outside supporters" once he received information about the website or how these outside supporters were going to keep him apprised of the status of his case.

Petitioner also conflates a communication regarding the direct appeal of his conviction and sentence on re-trial with his case for post-conviction relief. He emphasizes a letter he sent to the Florida Supreme Court on December 21, 2005, which he does not include in his Appendix. The Florida Supreme Court (Office of the Clerk) sent Petitioner a response to this letter, which Petitioner includes as Appendix P. The response noted that Petitioner had inquired as to the date "Mandate issued in [Case No.] SC89922 [the direct appeal of his conviction and sentence on re-trial]." (Pet'r's App. P.) In the response, the Clerk of the Court advised Petitioner that he needed to contact the Florida State Archives, as the case file had been sent there. (*Id.*) Contrary to Petitioner's characterization of the response as "acknowledging that Petitioner's request was also for a status of Case No. SC03-1033 [regarding his motion for state post-conviction relief]," the text of the Clerk's response does not so indicate.

as a basis for equitable tolling. Counsel for the State asserts that a notation of "refused" on the "Northeast Unit Writ Room Callout" sheet means that the *inmate refused*, not that prison officials denied him access to the room. (State's Sur-Reply ¶ 9.) The Court has no way of verifying this information; however, the mere assertion that the DOC denied Petitioner access to the "Writs" room does not constitute an extraordinary circumstance such that equitable tolling is justified. This allegation is similar to an allegation of deficiencies in or lack of access to a prison law library[5] – which the Eleventh Circuit has held does not provide a basis for equitable tolling, without more. *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1313-14 (11th Cir. 2001) (inmate's bare allegation of prison library's deficiency insufficient; no evidence as to when inmate learned of alleged deficiency or any efforts taken to remedy such deficiency); *Akins v. United States*, 204 F.3d 1086, 1090 (11th Cir. 2000) (prisoner's mere inability to access law library is not, in itself, an unconstitutional impediment; inmate must show such inability caused actual harm); *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (inmate offered no specificity as to allegation of lack of access to legal materials; "[i]t is not enough to say that the Minnesota facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate").

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[5] The Court assumes that the "Writs" room is a type of prison law library.

Here, Petitioner offers no specific information about the connection between his denial of access to the "Writs" room and the delay in filing his federal habeas petition. He also does not discuss his efforts to gain access to the "Writs" room once he was denied: did he seek out a reason for the denial? what was the response? how many times did he try to gain access to the room after the denial? was he denied each time? what was the reason given for the subsequent denials? Petitioner provides nothing but the bald assertion of his lack of access to the room. This is insufficient to establish an entitlement to equitable tolling.

4. Collins' failures as Petitioner's appointed counsel

Petitioner asserts that Collins failed to timely file the instant habeas petition and failed to keep him informed of the status of his case, and that such failures should allow for equitable tolling. It is well-settled that attorney negligence in calculating deadlines and understanding the law on habeas relief is not a basis for equitable tolling. *Helton*, 259 F.3d at 1313 (agreeing that attorney mistake does not warrant equitable tolling); *Steed*, 219 F.3d at 1300 ("[a]ny miscalculation or misinterpretation . . . in interpreting the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling"). As for Collins' alleged failure to keep Petitioner informed of the status of his case, the record shows that Collins met

with Petitioner on death row and communicated with him in writing on several occasions,[6] provided to Petitioner a detailed, written explanation of the strategy for the case, pursued state collateral relief for Petitioner, and filed a petition for a writ of *certiorari* from the United States Supreme Court. Collins had also prepared a proposed federal habeas petition on Petitioner's behalf and sent it to Petitioner for his review, "suggesting that Holland either sign the Petition for filing or indicate that he would prefer [Collins] comply with Holland's repeated requests that [Collins] move the trial court for leave to withdraw as counsel of record."[7] (State's App. [DE-41] Ex. 1.) Petitioner never responded to Collins' correspondence. (*Id.*)

Rather than cooperate with Collins, Petitioner filed numerous *pro se* motions during the time Collins represented him.[8] He repeatedly expressed his desire

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[6] The record evidence shows that Collins wrote at least eight letters to Petitioner – one undated letter (but sometime after May 30, 2002); one letter on December 23, 2002; one letter on January 22, 2003; letters on January 14, June 15, and July 19, 2004; and letters on January 18 and January 31, 2006.

[7] This is taken from paragraph (d) of Collins' March 24, 2006 motion to withdraw as Petitioner's counsel. It appears that, had Petitioner signed the document Collins drafted, his federal petition would still have been late. Even so, as discussed earlier, attorney negligence in filing a habeas petition does not constitute an extraordinary circumstance.

[8] A defendant does not have a right to "hybrid" representation – that is, to proceed *pro se* while simultaneously being

(Continued on following page)

for Collins to withdraw from the case and actively sought Collins' removal by filing motions to this effect on February 23 and June 17, 2004. Indeed, according to Collins, Petitioner "has complained of conflicts with every counsel he has had since the beginning of his case, including trial counsel in his first trial and again different counsel in his retrial."[9] (*Id.*)

Even if Collins was so careless in keeping Petitioner apprised of his case that his behavior could be characterized as an "extraordinary circumstance," Petitioner must still show that he acted with due diligence in order to be afforded equitable tolling. The record shows that he wrote a few letters to his attorney, but he did not seek any help from the court system to find out the date mandate issued denying his state habeas petition, nor did he seek aid from "outside supporters" he claimed he wanted to enlist to help him. This does not demonstrate due diligence. *See Powe v. Culliver*, Case No. 05-17150, 2006 WL 3253960, at *4 (11th Cir. Sep. 19, 2006) (finding "arguably extraordinary" circumstances because of attorneys' failures to respond to petitioner's letters,

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represented by an attorney. *Cross v. United States*, 893 F.2d 1287, 11291-92 (11th Cir. 1990).

[9] This statement is taken from a letter written by Collins' attorney, Kevin J. Kulik, in response to Petitioner's complaint to The Florida Bar regarding Collins. The Court notes that The Florida Bar did not initiate an investigation of Collins' conduct, finding that the issues Petitioner raised "did not rise to the standard of a violation of The Rules Regulating The Florida Bar." (Pet'r's App. H.)

but holding that petitioner did not show due diligence – where he wrote just three letters to his attorneys, did not seek further help from the trial court, and failed to file his state habeas petition on his own, even without a copy of his trial transcript).

5. Petitioner's long history of mental illness

In his brief, Petitioner alludes to his long history of mental illness as a basis for equitable tolling. Petitioner must be able to establish a causal connection between his mental incapacity and his ability to file a petition timely; the mere contention of mental incapacity, without more, is insufficient. *Lawrence*, 421 F.3d at 1226-27. Petitioner has offered no such connection. Indeed, as the State points out, Petitioner's conduct belies any claim that his mental illness prevented him from discovering through appropriate diligence the date his post-conviction appeal was decided and mandate issued. Petitioner has repeatedly sought to represent himself, filing several *pro* se motions and other documents with the Court even while represented by counsel. He has written numerous, cogent letters to counsel, the DOC, the courts, and The Florida Bar (complaining about his attorney's alleged incompetence). He has sought from the Florida Supreme Court copies of various pleadings and other filings in his state habeas case. What this shows is that Petitioner was certainly capable of using due diligence to ascertain his filing deadline for the instant habeas petition, but did not. Accordingly, it is hereby

ORDERED that:

(1) Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE-1] is DENIED AS UNTIMELY FILED;

(2) All pending motions not otherwise ruled upon in this Order are DENIED AS MOOT; and

(3) This case is CLOSED.

DONE and ORDERED in Miami, Florida, this 27th day of April, 2007.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
CASE NO. 06-20182-CIV-SEITZ

ALBERT HOLLAND, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

**ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT**

THIS MATTER is before the Court on Petitioner's Motion to Alter or Amend Judgment [DE-47] pursuant to Fed. R. Civ. P. 59(e). Petitioner's Rule 59(e) motion essentially asks the Court to reconsider and reverse its earlier Order [DE-46] granting Respondent's motion to dismiss Petitioner's petition for habeas corpus as untimely filed. *See Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005) (treating Rule 59(e) motion as motion to reconsider).

Reconsideration "is an extraordinary remedy to be employed sparingly." *Bautista v. Cruise Ships Catering and Service Int'l, N. V.* 350 F. Supp.2d 987, 992 (S.D. Fla. 2004) (citation omitted). A motion to reconsider will not be granted absent an intervening change in the law, availability of newly discovered evidence, or to correct clear error or prevent manifest injustice. *Id.* Petitioner's motion does not rely on

newly discovered evidence or intervening changes in the law. Rather, at best, Petitioner argues that the Court committed clear error in applying the equitable tolling doctrine to the facts of this case, and that the resulting dismissal is a manifest injustice. However, to the extent Petitioner merely reargues points previously considered and rejected by the Court, or tries to raise new arguments and point to new evidence that could have been raised earlier, this is insufficient grounds to satisfy the clear error or manifest injustice standard for granting a motion for reconsideration.[1] *See Bautista*, 350 F. Supp.2d at 992; *see also Linet*, 408 F.3d at 763 (a party cannot use a motion to reconsider "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.") (citations omitted). Furthermore, mere disagreement with the Court's conclusions is not enough to warrant reconsideration. *See Linet*, 408 F.3d at 763 (affirming denial of reconsideration where plaintiff merely "disagreed with the district court's treatment of certain facts and its legal conclusions" in the earlier order under review).

Petitioner's motion fails to meet the narrow standard for reconsideration. As explained in the

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[1] As such, the Court will not consider the two letters Petitioner submitted along with his motion, as there is no showing that the letters were not available earlier. *See Mays v. U.S. Postal Service*, 122 F.3d 43, 46 (11th Cir. 1997).

Court's Order under consideration, neither state-appointed counsel's erroneous calculation of the one-year limitations period nor his subsequent decision to seek a writ of certiorari from the U.S. Supreme Court instead of proceeding directly for federal habeas relief is sufficient to warrant tolling. *See Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007). The Court's analysis could have ended here, given that a litigant is generally not entitled to hybrid representation. *See Cross v. United States*, 893 F.2d 1287, 1291-92 (11th Cir. 1990). However, in an abundance of caution the Court considered whether Petitioner's *pro se* filing of a habeas petition on January 19, 2006, without regard to the fact that he was represented by counsel and had a petition for writ of certiorari pending with the U.S. Supreme Court, established tolling. The Court concluded then and reaffirms now that this case does not meet the high standard for tolling the limitations period.

In his motion for reconsideration, Petitioner argues first that the Court erred because it "did not clearly define the specific criteria for such a showing [of diligence]." Mot. at 2. However, as Petitioner himself concedes, and as the Eleventh Circuit has repeatedly emphasized, there is no precise formula for making such determinations. Rather, the analysis depends on the particular facts and circumstances of the case. *See Knight v. Schofield*, 292 F.3d 709, 711 (11th Cir. 2002). Furthermore, contrary to Petitioner's contention, the Court did not require him "to show perfection or that [his] efforts undertaken were

successful." *Id.* at 3. What the Court said then, and repeats now, is that a petitioner has to show that there were "extraordinary circumstances" that caused the delay, that these circumstances were beyond Petitioner's control, and that even his diligence could not overcome them. *See* DE-46 (April 27, 2007 Order) at 3. Thus, if Petitioner reasonably could have done more to *at least try* to overcome the reasons for the delay in filing, but did not do so, then he is not entitled to the extraordinary remedy of equitable tolling. Here, the Court found that what Petitioner did do to overcome the obstacles in his path to filing on time was not enough, and that he reasonably could have done more.

For example, Petitioner could have contacted the Florida Supreme Court directly to inquire about the pending appeal of his state post-conviction application. Specifically, he could have asked to be copied on the issuance of the mandate given his narrow window for seeking federal relief and his lack of confidence in his appointed lawyer.[2] Petitioner undeniably knew that the state appeal had been pending for quite some time, and knew that the mandate would trigger the time to file his federal habeas petition. Petitioner knew how to contact the Florida Supreme Court, and did so on several occasions for other reasons.

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[2] A response letter from the Supreme Court of Florida, Office of the Clerk shows that Petitioner asked about the date of issuance of the mandate on his direct appeal, but he inexplicably did not ask about the mandate in his post-conviction appeal.

Petitioner also had experienced perceived conflicts with his appointed counsel, and had expressed concerns to him about the issuance of the mandate and the running of the limitations clock. When those concerns went unaddressed, a reasonable person in his position would have done more to protect his interest in filing a federal habeas petition. The evidence submitted by Petitioner shows that he was decidedly not "in the dark" about his circumstances. Indeed, Petitioner ultimately overcame whatever reliance he had placed in his appointed counsel and filed his own habeas petition *pro se*.[3] Hence, even if counsel's failure to contact Petitioner was an "extraordinary circumstance," and not merely based on an erroneous reading of the rules (i.e., that the limitations period had already run so there was no urgency in filing a habeas petition with this Court or with notifying his client), Petitioner did not do enough to overcome the circumstances he found himself in.[4] The

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[3] While the Court questions the wisdom of prisoners routinely filing "protective petitions" (i.e., filing a timely habeas petition in federal court and seeking a stay while a petition for certiorari is pending in the U.S. Supreme Court), here, given Petitioner's circumstances it would have been a reasonable course of action. *See Lawrence*, 127 S. Ct. at 1084-85, 1089-90. In essence, Petitioner's *pro se* petition was a protective petition. Unfortunately, it was filed too late.

[4] Petitioner insists that counsel's failure to communicate to him the Supreme Court's decision until January 19, 2006, is an ethical violation. The rules require that counsel keep a client reasonably apprised of the status of his case. Whether waiting approximately seven weeks to inform Petitioner, when counsel believed, although erroneously, that the filing deadline had

(Continued on following page)

ease with which he could have *at least attempted* (without regard to actual success) to surmount the obstacles in his way, convinces the Court that he has not met his burden of meeting the narrow standard.

Petitioner also challenges the Court's determination that the Department of Correction's denial of his access to the writs room is not enough to establish tolling. DOC denied him access on January 9, 2006, and he apparently could not gain access to the writs room until January 18, 2006. However, even if they had granted him access on January 9th, the limitations period had already run on his federal petition. While this one belated attempt to go to the writs room is some evidence of diligence, one attempt is not enough to establish tolling given that he did not undertake other reasonable steps. This is especially so when Petitioner's case before the Florida Supreme Court had been pending since June of 2003. One denied attempt to access the writ rooms and three letters to counsel between June of 2003 and January of 2006 simply are not enough. A reasonable person who knew that the date of decision would trigger the clock on his federal petition, and believed that he had such conflicts with his appointed counsel that he sought to have him removed, would have at least tried to do more than Petitioner did. Therefore, based on a review of the entire record, and for the reasons

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already passed, rises to an extraordinary circumstance is debatable.

stated here and in the Court's previous orders, it is hereby

ORDERED that Petitioner's Motion to Alter or Amend Judgment [DE-47] is DENIED.

DONE and ORDERED in Miami, Florida, this 25th day of June, 2007.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record

539 F.3d 1334

United States Court of Appeals,
Eleventh Circuit.
**Albert HOLLAND**, Jr., Petitioner-Appellant,
v.
State of FLORIDA, Respondent-Appellee.

**No. 07-13366.**

Aug. 18, 2008.

Todd Gerald Scher (Court-Appointed), Sp. Asst. CCRC-South, Miami Beach, FL, for Holland.

Lisa-Marie Lerner, Leslie T. Campbell, West Palm Beach, FL, for Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Chief Judge, and MARCUS and PRYOR, Circuit Judges.

PER CURIAM:

**Albert Holland** (Petitioner), a prisoner on Florida's death row, filed a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. The district court dismissed the petition as untimely because it was filed beyond the one-year limitations period provided by 28 U.S.C. § 2244(d)(1). On appeal, Petitioner argues that he was entitled to equitable tolling of the limitations period for filing his federal habeas petition because of egregious conduct by his counsel during his post-conviction proceedings. Seeing no reversible error, we

affirm the district court's dismissal of Petitioner's petition.

## I. Background

In 1996, Petitioner was convicted of first-degree murder, attempted first-degree murder, attempted sexual battery, and armed robbery.[1] The state trial court sentenced Petitioner to death on the first-degree murder conviction. In 2000, the Florida Supreme Court affirmed Petitioner's convictions and sentences, *see Holland v. State*, 773 So.2d 1065 (Fla.2000), and the United States Supreme Court denied *certiorari* on 1 October 2001. *See Holland v. Florida*, 534 U.S. 834, 122 S.Ct. 83, 151 L.Ed.2d 46 (2001).[2]

On 19 September 2002, Petitioner filed a motion for post-conviction relief in the state trial court. The state court denied relief, and Petitioner appealed to the Florida Supreme Court. Petitioner also petitioned the Florida Supreme Court for a writ of habeas

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[1] This conviction followed Petitioner's second trial on the charged conduct. The Florida Supreme Court overturned Petitioner's prior conviction and sentence on grounds unrelated to this appeal.

[2] In November 2001, the state circuit court appointed attorney Bradley Collins to represent Petitioner.

corpus.[3] The state supreme court held oral argument on 10 February 2005.

While his post-conviction proceedings were pending in the Florida Supreme Court, Petitioner sent two letters to Collins – one on 3 March 2005, the other on 15 June 2005 – in which he inquired about the status of his appeal and expressed concern about the timely filing of his federal habeas petition. Collins did not respond to Petitioner's letters.

In October 2005, Petitioner also contacted the Florida Supreme Court about the use of its website "so that he could secure the assistance of outside supporters to keep him updated about the appeal."[4] In response, the clerk of the Florida Supreme Court mailed Petitioner printouts of the website with instructions about the menu options to be used.

On 10 November 2005, the Florida Supreme Court affirmed the denial of Petitioner's motion for post-conviction relief and denied his habeas petition; the mandate issued on 1 December 2005.[5] *See Holland*

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[3] Unsatisfied with Collins's representation, Petitioner filed a *pro se* motion to remove Collins as counsel and to appoint other counsel in February 2004 and again in June 2004. The state opposed these motions, and the state court denied them.

[4] As an inmate on death row, Petitioner lacked access to a computer.

[5] On 8 February 2006, Petitioner, through Collins, sought review of the denial of state post-conviction relief in the United States Supreme Court. The Court denied *certiorari* on 17 April 2006.

*v. State*, 916 So.2d 750 (Fla.2005). Unaware of the state supreme court's decision, Petitioner – on 9 January 2006 – wrote to Collins a third time regarding the status of his appeal and the status of his federal habeas petition. Collins had not responded to Petitioner's letter by 19 January, at which time Collins spoke to Petitioner.

On 18 January 2006, during a visit to the prison's writ room, Petitioner learned that the Florida Supreme Court denied his appeal. Petitioner telephoned Collins the next morning.[6] Later that day, Petitioner, acting *pro se,* filed a habeas petition in federal district court.

About two months later, Petitioner moved the district court to discharge Collins and to appoint new counsel. In June 2006, the district court allowed Collins to withdraw and appointed other counsel to represent Petitioner. Later, in response to a federal order to show cause, Petitioner, through current counsel (that is, not Collins), filed a pleading asserting that Petitioner was entitled to equitable tolling of the limitations period for filing his federal habeas petition. The district court concluded that equitable tolling was not warranted and dismissed Petitioner's petition as untimely. The district court then granted a certificate of appealability on the following issue:

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[6] Collins had written a letter to Petitioner – received by Petitioner on 19 January 2006 – expressing Collins's intention to file a petition for *certiorari* in the United States Supreme Court.

"whether equitable tolling enlarged the one-year time period for [Petitioner] to file his 28 U.S.C. § 2254 petition."

II. Standard of Review

We review the district court's denial of equitable tolling *de novo*. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir.2002). We review a trial court's decision whether to conduct an evidentiary hearing on an equitable tolling claim for an abuse of discretion. *Id.*

III. Discussion

Pertinent to this case, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), imposes a one-year statute of limitations for filing a federal habeas petition that runs from the date on which the state court judgment of conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). A judgment of conviction becomes final when "the Supreme Court has had an opportunity to review the case or the time for seeking review has expired." *Coates v. Byrd*, 211 F.3d 1225, 1226 (11th Cir.2000). Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled for the time during which "a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."

That Petitioner filed his federal habeas petition beyond the one-year limitations period provided by

28 U.S.C. § 2244(d)(1) is undisputed. Petitioner's limitations period began running on 1 October 2001, the date on which the United States Supreme Court denied *certiorari* on the direct appeal of Petitioner's convictions and sentences. Petitioner filed his motion for state post-conviction relief – a motion which tolled the limitations period – on 19 September 2002: 353 days later; thus, eleven months and nineteen days of the one-year period had expired before this state court filing.

Petitioner's post-conviction motion was denied, and the Florida Supreme Court affirmed the denial on 10 November 2005; the mandate issued on 1 December 2005. So, Petitioner then had eleven days, or until 12 December 2005, to file timely his federal habeas petition. Petitioner filed his petition on 19 January 2006: 38 days late.

Nonetheless, Petitioner's federal habeas petition may still be considered timely if he is entitled to equitable tolling. "Equitable tolling can be applied to prevent the application of AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition." *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir.2001). Equitable tolling is an extraordinary remedy that must be applied sparingly. *Drew*, 297 F.3d at 1286. "The burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner." *Id.* "To be entitled to equitable tolling, [Petitioner] must show (1) that he has been pursuing his rights diligently, and (2) that

some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 1085, 166 L.Ed.2d 924 (2007). A truly extreme case is required.

Petitioner points to several things that he contends demonstrate extraordinary circumstances: (1) Collins's alleged "egregious conduct"; (2) the Florida Supreme Court's failure to conduct oversight of his appointed attorney; (3) the state clerk's office's failure to inform him that his appeal had been denied; and (4) the Department of Corrections's refusal to allow Petitioner access to the "writs room."[7] Petitioner argues that these circumstances are extraordinary and both beyond his control and unavoidable despite his diligent efforts. We disagree.

On Collins's alleged "egregious conduct," this Court has said repeatedly that even attorney negligence is not a basis for equitable tolling. *Helton*, 259 F.3d at 1313; *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir.1999); *see also Lawrence*, 127 S.Ct. at 1085 ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel."). But recently we

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[7] Petitioner also notes his "long history of mental illness" as a factor in evaluating his claim for equitable tolling. Petitioner does not explain how his "mental illness" had a material effect on his failure to file timely his habeas petition.

addressed whether attorney misconduct going beyond "mere negligence" may constitute an extraordinary circumstance warranting equitable tolling. *See Downs v. McNeil*, 520 F.3d 1311 (11th Cir.2008).

In *Downs*, we vacated a district court order dismissing a habeas petition as untimely based on counsel's alleged behavior that "ran the gamut from acts of mere negligence to acts of gross negligence to acts of outright willful deceit." *Id.* at 1323. Although we viewed counsel's behavior as a whole, it is material to the *Downs* decision that the alleged acts of attorney misconduct included *affirmative misrepresentations* by counsel about the filing of a state habeas petition: such a filing would have tolled the federal habeas limitations period.[8] *Id.* at 1323-24. In *Downs*, we repeatedly and specifically noted counsel's lie: one that deprived the unknowing petitioner of as many as three months of his limitations period before it was discovered.[9] *Id.*

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[8] In two recent unpublished decisions, we reached similar conclusions. *See Kicklighter v. United States*, No. 07-14945, 2008 WL 2421728 (11th Cir. June 17, 2008) (unpublished); *Hammond v. Frazier*, 275 Fed.Appx. 896 (11th Cir.2008) (unpublished). Both cases involved allegations of affirmative misrepresentations by counsel. *Kicklighter*, 2008 WL 2421728, at *1 (petitioner alleged that counsel "lied to him about whether the appeal had been filed"); *Hammond v. Frazier*, 2008 WL 1891478, at *1 (petitioner alleged that "post-conviction counsel falsely told him that counsel had filed the state habeas petition").

[9] The defendant in *Downs* missed the deadline for filing his habeas petition by only eight days.

In contrast to *Downs*, Petitioner made in the district court no allegation of knowing or reckless factual misrepresentation or of lawyer dishonesty. Instead, Petitioner's allegations are limited to Collins's failure to communicate with Petitioner on the status of his case and to Collins's failure to file a federal habeas petition timely, despite repeated instructions to do so. We will assume that Collins's alleged conduct is negligent, even grossly negligent. But in our view, no allegation of lawyer negligence or of failure to meet a lawyer's standard of care – in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, *mental impairment* or so forth on the lawyer's part – can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough. This case is a pure-professional-negligence case. We decline to extend *Downs* to the different facts of this case.[10]

In a similar way, we are not persuaded that the alleged acts of the Florida Supreme Court or the Department of Corrections would entitle Petitioner to equitable tolling. The alleged failure by the Florida Supreme Court to conduct oversight of Petitioner's

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[10] We recall the maxim that "[e]very exception not watched, tends to take the place of the rule." *See* S. Peloubet, *Legal Maxims* 294 (1884) (1985 ed.) ("Toute exception non surveillee tend a prendre la place du principe."). We are attempting to keep the exception for extraordinary circumstances from being the rule.

appointed attorney is not an "extraordinary circumstance" entitling Petitioner to equitable tolling. *See Lawrence*, 127 S.Ct. at 1085-86 (that a state court appoints and supervises counsel "does not make the State accountable for a prisoner's delay"). And Petitioner presents no evidence that he ever asked – before the limitations period for filing his federal habeas petition had run – that the Florida Supreme Court provide him directly with notice of the decision on his post-conviction appeal. The letter that Petitioner presents to support his contention that the Florida Supreme Court should have provided him with notice was dated 21 December 2005: nine days after Petitioner's deadline for filing his federal habeas petition had passed. Likewise, the incident in which the Department of Corrections allegedly denied Petitioner access to the "writs room" took place on 9 January 2006: 28 days beyond the limitations period. Even assuming the allegations are true, Petitioner cannot reasonably argue that the incidents to which he draws our attention – both occurring after the limitations period had run – prevented him from filing a federal habeas petition timely.

We are satisfied that the district court did not err in declining to hold an evidentiary hearing on the issue of equitable tolling. "Section 2244 of Title 28 of the United States Code does not require a hearing on the issue of time-bar or equitable tolling, so the decision as to whether to conduct an evidentiary inquiry is a matter left to the sound discretion of the district court." *Drew*, 297 F.3d at 1292. Petitioner has

offered no reason to believe an evidentiary hearing would help him demonstrate the required extraordinary circumstances to warrant equitable tolling.

## IV. Conclusion

For the foregoing reasons, the district court's dismissal of Petitioner's petition for a writ of habeas corpus as untimely is affirmed.

AFFIRMED.

Supreme Court, U.S.
FILED
DEC 23 2009
OFFICE OF THE CLERK

No. 09-5327

# In The
# Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner,*

vs.

STATE OF FLORIDA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## JOINT APPENDIX
## VOLUME II OF II

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**Petition For Writ Of Certiorari Filed May 13, 2009**
**Certiorari Granted October 13, 2009**

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State of Florida
Plaintiff

VS.

Albert Holland
Defendant

case NO.: 90-15905CF

Motion to Amend
and Supplement State Habeas
Corpus Petition

Defendant Albert Holland, Jr. requests this court to grant him permission to amend and supplement the State Habeas Corpus Petition and appeal that defendant's postconviction attorney Mr. Bradley M. Collins will file or has filed on his behalf.




BEST AVAILABLE COPY

# Affidavit in Support of Defendant's Motion to Amend and Supplement State Habeas Corpus Petition

Defendant Albert Holland, for under the penalty of perjury, States:

I. I am the defendant in the above-entitled case. I make this affidavit in support of my motion to Amend and Supplement State Habeas Corpus petition as to my postconviction attorney's refusal to raise my sixteen legal claims in my State Habeas Corpus Petition.

II. On May 16, 2003 Judge Charles M. Greene, "In The Circuit Court of the 17th Judicial Circuit In And For Broward County, Florida," entered an order denying my motion to Vacate Judgment and Sentence in a capital case, pursuant to Fla. R. Crim. P. 3.850-3.851 following an evidentiary hearing and summarily disposing of other grounds.

III. Defendant has sixteen legal issues that are Fundamental errors which denied him due process of law at his trial in the 1996-1997 years.

IV. Because of the ineffective assistance of appellate counsel on my initial-direct appeal none of these sixteen issues were raised.

V. My postconviction attorney Refuses to raise those sixteen legal claims and because of this refusal defendant requests that this court allow him to amend and supplement the State Habeas Corpus Pe-

tition that will be or was filed on his behalf.

The sixteen legal issues that defendant asked his postconviction attorney Mr. Bradley M. Collins to include in his State Habeas Corpus Petition are as follows:

(1) appellate counsel failed to raise and to properly preserve on direct appeal the denial of defendant Albert Holland Jr.'s right to Substitute Counsel under Chandler v. Bunnell, 144 F.3d 1213 (9th Cir. 1998), and cases cited therein.

(2) appellate counsel failed to properly preserve on direct appeal defendant's 6th and 14th amendment Conflict of Interest Rights, under Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980), and cases cited therein.

(3) appellate counsel Failed to properly preserve on direct appeal defendant's claims of denial of due process of law in conviction of an attempted Sexual Battery, a crime not charged in the indictment, under Fla. R. Crim. P. 3.510; Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L.Ed.2d 644 (1948), and cases cited therein.

(4) appellate counsel failed to properly preserve on direct appeal defendant's claims that trial judge "abused his discretion" in removing the "attempted felony-murder" element from defendant's indictment, since after indictment has been returned, it's charge may not be broadened through amendment, except by Grand Jury itself, under Stirone v. United States, 80 S.Ct.

270 (1960), and cases cited therein.

(5) appellate counsel failed to properly preserve on direct appeal defendant's 6th and 14th amendment rights claims that all in court identifications were tainted by pretrial illegal showups under Gilbert v. State of California, 87 S. Ct. 1951 (1967), and that defendant was denied due process of law because pre-trial showups were done without notice to counsel and in absence of counsel and without first determining that they were of independent origin, under United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149 and Edwards v. State, 538 So. 2d 440 (Fla. 1989); Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972), and cases cited therein.

(6) appellate counsel failed to properly preserve on direct appeal defendant's claims that convictions were founded upon statements, which were not properly determined to be voluntary, and which deprived defendant of due process of law, under the 5th and 14th amendments, and that a hearing to determine voluntariness of confession was constitutionally mandated, under Jackson v. Denno, 84 S. Ct. 1774 (1964), and cases cited therein.

(7) appellate counsel failed to properly preserve on direct appeal defendant's claims that prosecutor impeached defendant Holland's exculpatory story and insanity defense told for first time at trial by cross-examining defendant about his failure to have told the story after receiving Miranda warnings at time of arrest, in violation of due process of law, under Doyle v. Ohio, 96 S. Ct. 2240 (1976); State v. Burwick,

4

442 So.2d 944 (1983), and cases cited therein.

(8) appellate counsel failed to properly preserve on direct appeal defendant's claims that prosecutor excluded qualified jurors on the basis of race and denied defendant equal protection of the law under Batson v. Kentucky, 106 S. Ct. 1712 (1986), and cases cited therein.

(9) appellate counsel failed to properly preserve on direct appeal defendant's claims that being indigent he was denied funds necessary to employ expert witnesses to counter the prosecution's expert witnesses for insanity defense, DNA, fingerprint evidence, medical examiners, firearm expert, and medical doctors to counter testimonies of medical doctors that testified both Thelma Johnson and Officer Scott - Winters, since defendant made preliminary showing that his sanity at the time of the offenses was likely to be a significant factor at trial, and therefore was denied due process of law under Ake v. Oklahoma, 105 S. Ct. 1087 (1985), and cases cited therein.

(10) appellate counsel failed to properly preserve on direct appeal defendant's claims that he was denied fair trial and due process of law due to joint trial amounting to miscarriage of justice. That he had a right to a severance of the charges to promote a fair determination of defendant's guilt or innocence of each offense, under Crosby v. State, 596 So.2d 94 (Fla. 1992); Griffin v. State, 639 So.2d 966 (Fla. 1994); Gruen v. State, 662 So.2d 758 (Fla. App. 4th Dist. 1995) and U.S. v. Nelson, 824 F.2d 1294 (2d Cir. 1987), and cases cited therein.

(11) appellate counsel failed to properly pre-

serve on direct appeal defendant's claims that Detective Butler's testimony about statements defendant made to him was never used as impeachment evidence when defendant took the stand, but was admitted in the State's case-in-chief, and that "once warnings have been given if individual indicates in any manner at any time prior to or during questioning that he wishes to remain silent, interrogation must cease," under Miranda V. Arizona, 86 S. Ct. 1602 (1966), because during the interview with Detective Butler, there are over 158 times where defendant declined or refused to answer Detective Butler's questions or defendant refused to speak to him at all, thereby on each refusal to answer him defendant was repeatedly invoking his right to remain silent, under United States V. Hernandez, 574 F.2d 1362 (1978), and cases cited therein.

(12) appellate counsel failed to properly preserve on direct appeal defendant's claims that the "False name (use of an alias) evidence" that was used at his trial contributed to the convictions, under United States V. Poole, 794 F.2d 462 (9th Cir. 1986), and cases cited therein.

(13) appellate counsel failed to properly preserve on direct appeal defendant's claims that he was denied an "attempted first-degree felony-murder" jury instruction.

(14) appellate counsel failed to properly preserve on direct appeal that defendant was denied a judgment of acquittal because of the insufficiency of the evidence to support verdicts for: (a) Attempted Sexual Battery; (b) Attempted First-degree murder; (c) Robbery with a firearm; and (d) First-

degree murder.

(15) appellate counsel failed to properly preserve on direct appeal that defendant was denied a Second degree felony - murder jury instruction.

(16) appellate counsel failed to properly preserve on direct appeal that defendant was illegally sentenced on all convictions.

(17) appellate counsel failed to properly preserve on direct appeal that defendant was denied a jury instruction on all applicable penalties for each crime that defendant was charged, and what would happen to defendant if he was found not guilty by reason of insanity.

(18) appellate counsel failed to properly preserve on direct appeal defendant's claims that "Robbery by Sudden Snatching" became law in 1998-99 two years before defendant's direct appeal was denied on October 6, 2000 and that the evidence in his case supports the crime "Robbery by Sudden Snatching" and that the applicable law that is applied to a case on (appeal) initial appeal is the law in effect at time of appeal. "Robbery by Sudden Snatching" is a Second - degree felony.

All of the legal claims that defendant has stated in this motion have merit. Appellate counsel's performance on direct appeal was deficient and the omissions are of such magnitude as to constitute serious errors and substantial deficiencies falling measurably outside the range of professionally acceptable performance and defendant was prejudiced, because appellate counsel's deficiency compromised the appellate process to such a

legal as to undermine confidence in the correctness of the result. All of the legal issues stated in this motion would in all probability have been found to have merit, had appellate counsel raised these issues on direct appeal, and therefore appellate counsel's performance was ineffective.

Wherefore, defendant prays that this court grants him permission to amend and supplement the State Habeas Corpus Petition that his post-conviction Attorney Bradley M. Collins will file or has filed on defendant Albert Holland, Jr.'s behalf.

Albert Holland, Jr.

Albert Holland, Jr.
D.O.C. # 122-651

DATED:
August 4, 2003

State of Florida
Department of Corrections

## OATH/VERIFICATION

Under penalties of perjury, I Albert Holland, JR. declare that I have read the foregoing (document) and that the facts stated in it are true.

August 4, 2003
Date

Albert Holland, JR.
Signature of Declarant

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing (document) has been furnished by the U.S. Mail—postage prepaid to: BRADLEY M. COLLINS, P.A.
600 South ANDREWS AVENUE, Suite 500
FORT LAUDERDALE, FLORIDA 33301

This 4th day of August, 2003.

Institution and address:

Albert Holland, JR.
UNION CORRECTIONAL INSTITUTION
7819 N.W. 228th STREET
RAIFORD, FLORIDA 32026-4440

DC2-527 (3-01)

Albert R. Holland, Jr.
D.O.C.# 122-651
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026-4440

Monday
September 8,
2003

COPY

FILED
THOMAS D. HALL
2003 SEP 10 P 2:50
CLERK, SUPREME COURT
BY

Dear Clerk of Court:

How are you doing? Fine I hope. On May 16, 2003 my 3.850 - 3.851 motion to vacate judgment and sentence was denied by my trial judge, Judge Charles M. Greene. A timely "Notice of Appeal" was filed by my postconviction appellate attorney Ms. Bradley M. Collins.

I write this letter to ask you if my postconviction appellate attorney Ms. Bradley M. Collins has filed my briefs for my State Habeas Corpus Petition - Appeal yet? I have not heard from my postconviction appellate attorney since he filed my "Notice of Appeal." I wrote him a letter a couple of months ago but he has not responded to my letter yet.

Please write me back and let me know as soon as your time permits and as soon as possible.

Thank you very much. Please have a nice day.

Sincerely,

Albert R. Holland, Jr.
Albert R. Holland, Jr.
D.O.C.# 122-651

Albert Holland, Jr.
D.O.C.# 122-65[illegible]
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida
32026-4490

Thursday,
November 2
2003

SC03-1033

Dear Mr. Thomas D.
Hall:

How are you? Fine I hope.
I received a notice (notification) from you dated Thursday, October 30, 2003, stating that the "State of Florida's motion to strike my pro se motions to amend and supplement State Habeas Corpus petition" that I filed on August 7, 2003 and August 18, 2003 was granted. my pro se motions to "Amend and supplement State Habeas Corpus Petition" was stricken as "un-authorized without prejudice to be refiled pursuant to Florida Rule of appellate Procedure 9.142(5)."

Mr. Hall, why have I not received a copy of the State of Florida's "motion to Strike" my foregoing pro se motions to "Amend and Supplement State Habeas Corpus Petition?"

Mr. Hall, would you please send me a copy of the State of Florida's "motion to Strike" my foregoing pro se motions to "Amend and supplement State Habeas Corpus Petition?"

Mr. Hall, when will I be allowed to refile my motions to "Amend and Supple-

ment State Habeas Corpus Petition?"

Rule 9.142(5) states that "Petitions for Extraordinary Relief in death penalty cases (cases), all petitions for extraordinary relief over which the Supreme court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief (under under Florida Rule of Criminal Procedure 3.851. When will my postconviction ATTORNEY be required to file my writ of habeas corpus and appeal? And when will I be allowed to file my motions to "amend and supplement the State Habeas Corpus Petition" that my attorney files on my behalf? That word Simultaneously has me confused. How can I file my motions to "amend and Supplement State Habeas Corpus Petition" simultaneously with the motion that my attorney will file on my behalf if I have not received a copy of it or read it? Please explain this to me. Thank you very much.

Mr. Hall, please answer my questions and write me back and also send me the aforementioned information and documents as soon as your time permits and as soon as possible. Thank you very much. Please have a nice day.

Sincerely,
Albert Holland, Jr.
Albert Holland, Jr.

State of Florida
Plaintiff

VS.

Albert Holland, Jr.
Defendant

SC NO.: SC03-1033
Lower Tribunal No.: 90-154
-SCF10A

FILED
THOMAS D. HALL
2004 JAN 29 P 1:50
CLERK, SUPREME COURT

Motion to Amend and Supplement State Habeas Corpus Petition

Defendant Albert Holland, Jr. requests this court to grant him permission to amend and supplement the State Habeas Corpus Petition and appeal that defendant's postconviction attorney Mr. Bradley M. Collins has filed on his behalf.

See 2/4/04, order

1

Affidavit in support of Defendant's motion to Amend and supplement State Habeas Corpus Petition

Defendant Albert Holland, Jr. under the penalty of perjury, states:

I. I am the defendant in the above-entitled case. I make this affidavit in support of my motion to amend and supplement State Habeas Corpus Petition as to my postconviction attorney refusal to raise my (19) nineteen legal claims in my State Habeas Corpus Petition.

II. On May 16, 2003 Judge Charles M. Greene "of The Circuit Court of the 17th Judicial Circuit In And For Broward County, Florida," entered an order denying my motion to Vacate Judgment and Sentence in a capital case, pursuant to Fla. R. Crim. P. 3.850-3.851 following an evidentiary hearing, and summarily disposing of other grounds.

III. Defendant has nineteen legal claims that are fundamental errors which denied him due process of law at his trial in the years 1996-1997.

IV. Because of the ineffective assistance of appellate counsel on my initial-direct appeal none of these nineteen issues were Raised.

V. my postconviction attorney refused to Raise those nineteen legal claims and because of this refusal defendant requests that this court allow him to amend and supplement the State Habeas Corpus Petition that my attorney has filed on my behalf.

The nineteen legal issues that defendant asked his postconviction attorney to include in his State Habeas Corpus Petition are as

follows:
1) Appellate counsel failed to raise and to properly preserve on Direct Appeal the denia of defendant's Right to Substitute Counsel, und Chandell v. Bunnell, 144 F.3d 1213 (9th cir. 1998, and other cases cited therein.
2) Appellate Counsel failed to properly preser -e on Direct Appeal defendant's sixth and fourteenth amendment conflict of interest Rights under Cuyler v. Sullivan, 446 U.S. 335 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), and other cases cited therein.
3) Appellate Counsel failed to properly prese -ve on Direct Appeal defendant's claims of denial of due process of law in conviction of an attempted Sexual battery, a crime not charged in the indictment, under Fla. R. Crim. P. 3.510, Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 2d 644 (1998), and other cases cited therein.
4) Appellate Counsel failed to properly preser on Direct Appeal defendant's claims that there was a fatal "Variance" between the State's indictment and its proof because the facts proved by the State at trial differ from those alleged in the indictment. see U.S. v. Townsend, 924 F.2d 1385 (7th Cir. 1991) and cases cited therein.
5) Appellate Counsel failed to properly prese -ve on Direct Appeal defendant's claims tha trial judge "Abused his Discretion" in Removin the "attempted Felony-murder" element from defendants indictment, since after an indict

ment has been returned, it's charge may not be broadened through amendment, epdp by Grand Jury itself, under Stirone v. United States, 80 S. Ct. 270 (1960), and cases cited therein.

6) Appellate Counsel failed to properly preserve on Direct appeal defendant's sixth and fourteenth amendment rights claims that all in-court identifications were tainted by pretrial illegal showups, under Gilbert v. State of California, 87 S. Ct. 1951 (1967), and that defendant was denied due process of law because pre-trial showups were done without notice to counsel and in absence of counsel and without first determining that they were of independent origin, under United States v. Wade, 388 U.S. 218 875 S. Ct. 1926, 18 L. Ed. 2d 1149 and Edwards v. State 538 So. 2d 440 (Fla. 1989); Neil v. Biggers, 409 U.S. 188 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and cases cited therein. Also: Kimmer V. State, 825 So. 2d 304 (Fla. 2002)

7) Appellate Counsel failed to properly preserve. Direct appeal defendant's claims that conviction were founded upon statements, which were not properly determined to be voluntary, and was deprived defendant of due process of law, under the 5th and 14th amendments, and that a hearin to determine voluntariness of confession was constitutionally mandated. Jackson V. Denno, 84 S. Ct. 1774 (1964), and cases cited therein.

8) Appellate Counsel failed to properly preserve on Direct appeal defendant's claims that prosecutor impeached defendant's exculpatory story and insanity defense told for first time at

trial by cross-examining defendant about his failure to have told the story after receiving Miranda Warnings at time of arrest, in violation of due process of law under Doyle v. Ohio, 96 S. Ct. 2240 (1976); State v. Bardwick, 442 So. 2d 944 (1983), and cases cited therein.

9) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that prosecutor excluded qualified jurors on the basis of race and denied defendant equal protection of the law under Batson v. Kentucky, 106 S. Ct. 1712 (1986), and cases cited therein.

10) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that being indigent he was denied funds necessary to employ expert witnesses to counter the prosecution's expert witnesses for Insanity Defense, DNA fingerprint evidence, Medical Examiner, firearms experts, and medical doctors to counter testimonies of medical doctors that treated both Thelma Johnson and Officer Scott Winters, since defendant made preliminary showing that his sanity at the time of the offenses was likely to be a significant factor at trial, and therefore was denied due process of law, under Ake v. Oklahoma, 105 S. Ct. 1087 (1985), and cases cited therein.

11) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that he was denied fair trial and due process of law due to joint trial amounting to miscarriage of justice. That he had a right to a severa-

of the charges to promote a fair determination of defendant's guilt or innocence of each offense under Crosby v. State, 596 So.2d 447 (Fla. 1992); Griffin v. State, 639 So.2d 966 (Fla. 1994); Griner v. State, 662 So.2d 758 (Fla. App. 4th Dist. 1995); and U.S. v. Nerenson, 824 F.2d 1294 (2d cir. 1987) and cases cited therein.

12) Appellate Counsel failed to properly preserve on direct appeal defendant's claim that Detective Butler's testimony about statements defendant made to him was never used as impeachment evidence when defendant took the stand, but was admitted in the State's case-in-chief, and that "once warnings have been given if individual indicates in any manner at any time prior to or during questioning that he wishes to remain silent, interrogation must cease" under Miranda v. Arizona, 86 S.Ct 1602 (1966), because during the interview with Detective Butler, there are over 158 times where defendant declined or refused to answer Detective Butler's questions or defendant refused to speak to him at all there on each refusal to answer him defendant was repeatedly invoking his right to remain silent, under United States v. Hernandez 574 F.2d 1362 (1978), and cases cited therein.

13) Appellate Counsel failed to properly preserve on direct appeal defendant's claim that the "Evidence that the defendant gave police a false name (alias) that was used at his trial con-

tributed to the convictions, under United States v. Poole, 794 F.2d 462 (9th cir. 1986), and cases cited therein.

14) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that he was denied an "attempted First-degree Felony-murder jury instruction."

15) Appellate Counsel failed to properly preserve on Direct Appeal that defendant was denied a judgment of acquittal, because of the insufficiency of the evidence to support verdicts for: (a) attempted Sexual battery; (b) attempted First-degree murder; (c) Robbery with a firearm; and (d) First-degree murder.

16) Appellate Counsel failed to properly preserve on Direct Appeal that defendant was denied a Second-degree felony-murder jury instruction.

17) Appellate Counsel failed to properly preserve on Direct appeal that defendant was illegally sentenced on all convictions.

18) Appellate Counsel failed to properly preserve on Direct appeal that defendant was denied a jury instruction on all applicable penalties for each offense (crime) that defendant was charged, and what would happen to defendant if he were found not guilty by reason of insanity.

19) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that "Robbery by Sudden Snatching" became law in 1997, two years before defendant's Direct Appeal was denied on October 6, 2000 and that

the evidence in his case supports the elem "Robbery by Sudden Snatching" and that the applicable law that is applied to a case on "initial appeal" is the law in effect at time of appeal. "Robbery by Sudden Snatching is a second-degree felony.

All of the legal claims that defendant has stated in this motion have merit. Appellate Counsel's performance on Direct appeal was deficient and the omissions are of such magnitude as to constitute serious errors and substantial deficiencies falling measurably outside the range of professionally acceptable performance and defendant was prejudiced because appellate Counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. All of the legal issues stated in this motion would in all probability have been found to have merit had appellate counsel raised these issues on Direct Appeal, and therefore appellate counsel's performance was ineffective.

Wherefore, defendant prays that this court grants him permission to amend and supplement the State Habeas Corpus Petition that his postconviction attorney Bradley M. Collins has filed on defendant Albert Holland, Jr's behalf.

State of Florida
Department of Corrections

## OATH/VERIFICATION

Under penalties of perjury, I Albert Holland, Jr. declare that I have read the foregoing (document) and that the facts stated in it are true.

January 16, 2004
Date

Albert Holland, Jr.
Signature of Declarant

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing (document) has been furnished by the U.S. Mail—postage prepaid to: Clerk of The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399.

This 16 day of January, 2004. Albert Holland, Jr.
Signature

Institution and address:

Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026-4440

DC2-527 (3-01)

State of Florida
Plaintiff

vs.

Albert R. Holland, Jr.
Defendant

case Nos.: SC03-1033 and SC04-34
Lower Tribunal No.: 90-15905 CF 10A

Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-Free, Substitute Counsel

Comes now the defendant Albert R. Holland, Jr., filing pro se and moves this Honorable Court to remove (dismiss) counsel Mr. Bradley M. Collins from further representation of his capital case. In addition, defendant hereby requests that competent, Conflict-Free, Substitute Counsel be appointed to represent defendant's capital case. In support of this motion defendant states:

1. On January 20, 2004 and January 26, 2004 defendant filed pro se motions to Amend and Supplement "State Habeas Corpus Petition" that was filed on January 12, 2004 by Mr. Bradley M. Collins on defendant's behalf. The foregoing pro se motions were stricken.

2. Defendant has (12) written legal issues (claims) that are fundamental errors, which denied him due process of law at his trial in the years 1996-1997, which were not raised in his State Habeas Corpus Petition filed on January 12, 2004.

3. Because of the ineffective assistance of appellate counsel on defendant's initial direct appeal none of these 12 written issues were raised and Mr. Bradley M. Collins was legally obligated to raise these written legal claims in defendant's State Habeas Corpus Petition. Mr. Collins refused to litigate these written legal claims above that a legal conflict exists

4. Because of Ms. Collin's refusal to include defendant's nineteen legal claims in defendant's State Habeas Corpus Petition filed January 12, 2004 defendant objects to that petition and requests that this court appoint him competent, conflict-free, Substitute Counsel to represent him and his capital case hereupon.

5. Defendant objects to the State Habeas Corpus Petition that was filed on January 12, 2004, because it did not include his other nineteen legal claims that defendant asked Ms. Collins to include in his State Habeas Corpus Petition, and therefore said petition does not represent the defendant. Defendant further states that it is the State Habeas Corpus Petition that was filed and the remaining nineteen legal issues combined that represents him in this cause.

6. The defendant specifically states that he does not trust or has any confidence in Ms. Collin's ability to represent the defendant. He has lied to defendant on numerous occasions and is actively representing conflicting interests. A defendant is entitled to be represented by "Conflict-Free" Counsel.

7. Defendant states that Ms. Collin's refusal and failure to litigate issues which are fundamental errors and have merit and which are vital to the defendant's cause, demonstrates that Ms. Collin's is in league with the People of the State of Florida against the defendant, and defendant believes that the court should not force counsel upon him who defendant does not trust.

8. That the defendant states that his foregoing pro se motions to Amend and Supplement State Habeas Corpus Petition raised numerous grounds which de-

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demonstrate that he was deprived the effectual assistance of counsel for his direct appeal.

9. Because Mr. Collins refused to litigate the foregoing matters, legal issues which defendant raised in his following pro se motions to "Amend and Supplement State Habeas Corpus Petition") demonstrate that Mr. Collins's representation of defendant was ineffective and that defendant will be prejudiced by Mr. Collins's ineffectiveness.

10. That defendant has a constitutional right to conflict-free, substitute counsel, once a defendant in a state criminal trial has a right to substitute counsel under the 6th and fourteenth amendments, see Crandell v. Bannell, 144 F.3d 1213 (9th cir. 1998), there should be no reason why the statutory right should not also be afforded to a defendant on appeal as well. In U.S. v. Horton, 845 F.2d 1414 (7th cir. 1988) the law states that "Once a defendant claiming ineffective assistance of counsel has shown that the actual conflict adversely affected his counsel's performance, prejudice to defendant is presumed and no further showing is necessary." This standard should also apply to Mr. Collins's performance on defendant's State Habeas Corpus Petition. (His) refusal to litigate defendant's matters legal claims demonstrate actual conflict of interest and defendant was prejudiced by his deficient performance. "An effective attorney must play the role of an active advocate, rather than a mere friend of the court.") see Osborn v. Shillinger, 861 Fed 612-25 (10th cir. 1988).

11. Mr. (Collins) a representation of defendant "Falls below an objective standard of reasonableness, under

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providing professional norms for capital cases. The conflict between Mr. Collins and defendant is so great that it is preventing defendant from having an adequate and complete appeal. State Habeas Corpus Petition. Mr. Collins has never made any reasonable effort to establish any relationship of trust or confidence with defendant and for that reason defendant wants him removed (dismissed) off his capital case. Mr. Collins's deficient performance in presenting defendant's matters & legal claims is prejudicing his post conviction appellate proceedings. Mr. Collins has made choices of alternative courses of action that favors interests in competition with defendant's interests. Mr. Collins has other interests and loyalties.

The nineteen legal issues that defendant asked Mr. Collins to include in his State Habeas Corpus Petition are as follows:

1) Appellate Counsel failed to properly preserve on Direct Appeal the denial of defendant's right to Substitute Counsel under Chandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998), and cases cited therein.

2) Appellate Counsel failed to properly preserve on Direct Appeal defendant's 6th and fourteenth amendment rights of Conflict of Interest under Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), and cases cited therein.

3) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims of denial of due process of law in conviction of an attempted Sexual battery, a crime not charged in the indictment, under Fla. R. Crim. P. 3.510; Cole v. Arkansas,

333 U.S. 196, 68 S.Ct. 514, 92 L.Ed.2d 644 (1998) and cases cited therein.

4) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that there was a fatal "Variance" between the State's indictment and its proof, because the facts proved by the State at trial differ from those alleged in the indictment see U.S. v. Townsend, 924 F.2d 1385 (7th cir. 1991) and cases cited therein.

5) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that trial judge "Abused his Discretion" in removing the "attempted felony-murder" element from defendant's indictment, since after an indictment has been returned, it's charge may not be broadened through amendment, except by Grand Jury itself, under Stirone v. United States, 80 S.Ct. 270 (1960), and cases cited therein.

6) Appellate Counsel failed to properly preserve on Direct Appeal defendant's sixth and fourteenth amendment rights claims that all in court identifications were tainted by pre-trial illegal showups, under Gilbert v. State of California, 87 S.Ct. 1951 (1967) and that defendant was denied due process of law because pre-trial showups were done without notice to counsel and in the absence of counsel and without first determining that they were of independent origin, under United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 and Edwards v. State, 538 So.2d 440 (Fla. 1989); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and cases cited therein.

7) Appellate counsel failed to properly preserve

on Direct Appeal defendant's claims that convictions were founded upon statements, which were not properly determined to be voluntary and which deprived defendant of due process of law under the 6th and 14th amendments, and that a hearing to determine voluntariness of confession was constitutionally mandated all Jackson V. Denno, 84 S. Ct. 1774 (1964), and cases cited therein.

8) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that prosecutor impeached defendant's exculpatory story and Innocent Defense told for first time at trial by cross-examining defendant about his failure to have told the story after receiving Miranda Warnings at time of arrest, in violation of due process of law, under Doyle V. Ohio, 96 S. Ct. 2240 (1976); State V. Bulwick, 442 So. 2d 944 (1983), and cases cited therein.

9) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that prosecutor excluded qualified jurors on the basis of race and denied defendant equal protection of the law under Batson V. Kentucky, 106 S. Ct. 1712 (1986), and cases cited therein.

10) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claims that being indigent he was denied funds necessary to employ expert witnesses to counter the prosecution's expert witnesses for Innocent Defense, DNA, fingerprint evidence, medical Examiner, Pathologist's autopsy; and medical doctors to counter testimonies of medical doctors that treated both Theba

~~a Johnson and Officer Scott Mentzer, since de-~~
~~fendant made preliminary showing that his~~
~~sanity at the time of the offenses was liti-~~
~~gable to be a significant factor at trial, and~~
~~therefore was denied due process of law, un-~~
~~der Ake v. Oklahoma, 105 S. Ct. 1087 (1985), and~~
~~cases cited therein.~~

~~11) Appellate counsel failed to properly preserve~~
~~on Direct Appeal defendant's claims that he~~
~~was denied fair trial and due process of law~~
~~due to joint trial amounting to misjoinder~~
~~of parties that he had a right to severance~~
~~of the charges to promote a fair determination~~
~~of defendant's guilt or innocence of each offen-~~
~~se under Cleaby v. State, 596 So. 2d 477 (Fla.~~
~~1992); Griffin v. State, 462 So. 2d 758 (Fla. App. 4th~~
~~Dist. 1985); and U.S. v. Nelson, 824 F. 2d 1294~~
~~(2d Cir. 1987).~~

~~12) Appellate counsel failed to properly preserve~~
~~on Direct Appeal defendant's claim that De-~~
~~tective Butler's statements about statements de-~~
~~fendant made to him was never used as im-~~
~~peachment evidence when defendant took the~~
~~stand, but was admitted in the State's case-~~
~~in-chief, and that "once warnings have been~~
~~given, if individual indicates in any manner~~
~~at any time prior to or during questioning~~
~~that he wishes to remain silent, interrogation~~
~~must cease" under Miranda v. Arizona, 86 S. Ct.~~
~~1602 (1966), because during the interview with~~
~~Detective Butler, there are over 158 times where~~
~~defendant declined or refused to answer De-~~
~~tective Butler's questions or defendant refused~~

to speak to him at all thereby on each
refusal to answer him defendant was repeat-
edly invoking his right to remain silent,
under United States v. Hernandez, 574 F.2d
1362 (1978), and cases cited therein.
13) Appellate counsel failed to properly preserve
on Direct appeal defendant's claims that the
"Evidence that the defendant gave police a fala-
e name (alias)," that was used at the trial
against him contributed to the convictions, under
United States v. Poole, 794 F.2d 462 (9th cir. 1986),
and cases cited therein.
14) Appellate counsel failed to properly preserve
on Direct Appeal defendant's claims that he
was denied an "attempted First-degree Felony
-murder jury instruction."
15) Appellate Counsel failed to properly preserve
on Direct appeal that defendant was denied a
judgment of acquittal, because of the insuffici-
-ency of the evidence to support verdicts for:
(a.) attempted Sexual battery; (b.) attempted First
-degree murder; (c.) Robbery with a firearm;
and (d.) First-degree Murder.
16) Appellate Counsel failed to properly preserve
on Direct Appeal that defendant was denied a
Second-degree felony murder jury instruction
17) Appellate counsel failed to properly preserve
on Direct appeal that defendant was illegally
sentenced on all convictions.
18) Appellate Counsel failed to properly preserve
on Direct Appeal that defendant was denied
a guilty instruction on all applicable penalties
for each crime that defendant was charged,

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and what would happen to defendant if he were found not guilty by reason of insanity.

19) Appellate Counsel failed to properly preserve on Direct Appeal defendant's claim that "Robbery by Sudden Snatching" became law in 1998 two years before defendant's Direct Appeal was denied on October 6, 2000 and that the evidence in his case supports the crime "Robbery by Sudden Snatching" and that the applicable law to be applied to a case on initial appeal is the law in effect at time of appeal. "Robbery by Sudden Snatching" is a Second-degree Felony.

In conclusion, all of the nineteen legal claims that defendant has stated in this motion and also that defendant asked Mr. Collins to include in his State Habeas Corpus Petition that was filed on January 12, 2004 have merit and are fundamental errors depriving defendant due process of law, and because of Appellate counsel's performance on defendant's Direct Appeal was deficient and the omissions are of such magnitude as to constitute state's claims errors and substantial deficiencies falling measurably outside the range of professionally acceptable performance and defendant was prejudiced, because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. All of the legal issues stated in this motion would in all probability have been found to have merit had appellate counsel raised these issues on

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defendant's Direct appeal, and therefore appellate counsel's performance was ineffective.

Mr. Bradley M. Collins was legally bound and obligated to include each and every one of the nineteen claims stated in this motion and because of his incompetence defendant prays that this Honorable Court remove (dismissal) him from defendant's capital case and postconviction proceedings and appoint defendant competent, conflict-free, Substitute Counsel who will be willing to include and litigate all of defendant's legal issues that have merit in his State Habeas Corpus Petition.

Wherefore, the defendant prays that and respectfully requests that this Honorable Court recognizes the conflict stated in this motion and removes Mr. Collins from further representation of defendant's capital case and postconviction, appellate proceedings and appoint competent, conflict-free, Substitute Counsel for defendant.

For a more thorough, detailed analysis of the factual and legal aspects of the foregoing legal claims in this motion, please refer to:

(a) defendant's "Rose" motion to Amend and Supplement the Record on Appeal 3.850" filed on September 22, 2002, in the circuit court of the 17th judicial circuit, in and for Broward County, Florida.

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(b) letter that defendant wrote and sent to the Honorable Judge Charles Greene on February 21, 2003, in the circuit court of the 17th Judicial circuit in and for Broward County, Florida.

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## OATH/VERIFICATION

Under penalties of perjury, I Albert R. Holland, Jr. declare that I have read the foregoing document and the facts stated in it are true.

FEBRUARY 18, 2004
Date

Albert R. Holland, Jr.
Signature of Declarant

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document motion to Remove Conflict Counsel has been furnished by the U.S. Mail – postage prepaid to: Bradley M. Collins, P.A. 600 South Andrews Avenue Suite 500 Fort Lauderdale, Florida 33301

This 18th day of FEBRUARY, 2004.

Institution and address:

Albert R. Holland, Jr.
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-( )

Albert R. Holland Jr.
D.O.C.# 122-[illegible]51.
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida 32026-4450
#P5210

Monday,
April 26,
2004

Case Number: SC03-1033

Lower Tribunal case number: 90-15905CF10A

FILED
SID J. WHITE
2004 APR 29 A 11:10
CLERK, SUPREME COURT

Dear Mr. Thomas D. Hall:

How are you? Fine I hope.

I write this letter to inform you that my postconviction, appellate attorney Mr. Bradley R. Collins filed my brief on January 12, 2004. On January 20, 2004 and January 26 2004 my pro se motions to Amend and Supplement State Habeas Corpus Petition was filed in The Supreme Court of Florida. On Wednesday, February 4, 2004 my court document and records show that my pro se Motions to Amend and Supplement State Habeas Corpus Petition were stricken.

Mr. Hall, on February 23, 2004 you filed my pro se Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-free, Substitute Counsel.

Mr. Hall, I have not yet received a copy of the Appellee's (State of Florida's) Answer brief in Response to the brief my postconviction, appellate attorney Mr. Bradley R. Collins

Please see Page 2 →

filed in behalf of me on January 12, 2004. I also, have not received a copy of Mr. Bradley M. Collin's Reply brief to the Appellee's "Answer brief."

Mr. Hall, would you please be kind enough to send me copies of the Appellee's foregoing "Answer brief" Mr. Bradley M. Collin's "Reply brief" and a copy of the Appellee's or Mr. Bradley M. Collin's response to my pro se "motion to Remove Conflict Counsel and to appoint Competent, Conflict-Free, Substitute Counsel," and if possible the Supreme Court of Florida's ruling on my "motion to Remove Conflict Counsel and to appoint Competent, Conflict-Free, Substitute Counsel"?

Mr. Hall, because I know and understand how busy you must be, I decided to wait until I believed that all of the foregoing legal documents have been filed before writing you this letter, instead of writing separate letters acting for each copy individually. I decided to include everything in one letter.

Mr. Hall, if I had a competent, conflict-free, postconviction, appellate attorney representing me, I would not have to write you this letter. I'm not trying to get on your nerves I just would like to know exactly what is happening with my case on appeal to The Supreme Court of Florida.

Mr. Hall if nothing else, please write me back to let me know that you and your office have at least received this letter and have also considered its contents.

over Please →

I thank you very much.
Please have a nice day and wonderful week.

Sincerely,

Albert R. Holland, Jr.

Albert R. Holland, JR.

D.O.C.# 122-651

In The Circuit Court Of The
Seventeenth Judicial Circuit
In And For Broward County,
Florida

State of Florida
Plaintiff

vs.

Albert R. Holland, Jr.
Defendant

Case NOS.: SC03-1033
and SC04-34

Lower Tribunal Number
90-15905CF10A

Defendant's Motion to Remove Conflict Counsel and also Requesting a Nelson Hearing to Show Cause Why Competent, Conflict-free, Substitute Counsel Must Be Appointed To Replace Attorney Bradley M. Collins From Further Representation Of Defendant's Capital Case And Postconviction Appellate Proceedings.

Comes now the defendant Albert R. Holland Jr. filing pro se and moves this Honorable court to remove (dismiss) counsel Mr. Bradley M. Collins from further representation of his capital case and postconviction appellate proceedings. In addition, defendant hereby requests that competent, conflict-free, Substitute Counsel be appointed to represent defendant's capital case and/or a Nelson Hearing be granted to defendant, (see nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1974), so that he can explain to this court why Mr. Collin's must

1 Dec 10-22-04 Order.

be Removed from further Representation of defendant's capital case and postconviction, ap-pellate proceedings, and competent, conflict-free Substitute counsel should be appointed to repla-ce him. Defendant also requests that this court at the nelson Hearing enquire of Mr. Coll-ins as to why he refused to raise and include defendant's (19) nineteen legal claims in defendan-s State Habeas Corpus Petition that he filed on January 12, 2004; (2) why he is consciously tryi-ng to get defendant's nineteen legal claims procedurally barred from further appellate review and consideration; (3) why he has not kept defendant updated on the status of defen-dant's capital case; and (4) why defendant has not seen or spoken to him since April, 2003 at defendant's evidentiary Hearing in Ft. Lau-derdale, Broward County, Florida.

As this court already knows that on September 22, 2002 defendant filed a "Motion to Amend and Supplement the 3.850 motion which Mr. Collins filed on defendant's behalf. Defendant's motion was stricken.

In support of this motion that defen-dant is now filing states:

1. On January 20, 2004 and January 26, 200 defendant filed pro se "motions (in the Supre-me Court of Florida) to Amend and Supplement State Habeas Corpus Petition" that was filed o January 12, 2004 by Mr. Collins on defendant's behalf. The foregoing motions were stricke

2. Defendant has nineteen legal claims that are fundamental errors, which denied

defendant due process of law at his trial in the years 1996-97, which were not raised in his State Habeas Corpus Petition filed on January 12, 2004.

3. Because of the ineffective assistance of appellate counsel on defendant's initial-direct appeal none of those nineteen issues were raised and Mr. Collins was legally obligated to raise those nineteen legal claims in defendant's State Habeas Corpus Petition. Mr. Collin's refusal to litigate those nineteen legal claims shows that a legal conflict exists because fundamental errors may be raised at any time. Chapter 9 "Evidence Code" 90.104(3) Rulings on evidence states that "nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights even though such errors were not brought to the attention of the trial judge." Federal Rule of Criminal Procedure 52(b) states the same thing, that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

4. Because of Mr. Collin's refusal to include defendant's nineteen legal claims in defendant's State Habeas Corpus Petition that was filed on January 12, 2004 defendant objects to that petition.

5. Defendant objects to the State Habeas Corpus Petition that was filed on January 12, 2004 because it did not include his other nineteen legal claims that defendant asked Mr. Collins to include in that Habeas Corpus Petition, and therefore said petition does not represent the

defendant. Defendant further states that it is the State Habeas Corpus Petition that was filed and the remaining nineteen legal claims combined that represents him in this cause.

6. The defendant specifically states that he does not trust or has any confidence in Mr. Collin's ability to represent the defendant. He has lied to defendant on numerous occasions; has refused to send defendant statements and depositions that will help to prove defendant's innocence. Mr. Collins has not sent defendant the State of Florida's "Answer Brief" to defendant's "Initial Brief" that was filed on January 12, 2004, or his "Reply Brief." Defendant does know that he will receive a copy of the State of Florida's "Reply to Response" when that is filed. Defendant also has not received a copy of the "Response" to defendant's "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-free, Substitute Counsel," which defendant filed on February 23, 2004 with the Clerk of the Supreme Court of Florida, which motion was also stricken. Defendant has no idea what is going on with his capital case on appeal to the Supreme Court of Florida. Mr. Collin's has abandoned the defendant. Mr. Collins is actively representing conflicting interests, and that irreconcilable conflict is having an adverse effect on specific instances of Mr. Collins' performance. A defendant is entitled to be represented by "Conflict-free Counsel.

7. Defendant states that Mr. Collin's refu-

sal and failure to litigate issues which are fundamental errors and have merit and which are vital to the defendant's cause demonstrates that Mr. Collin's is in league with the People of the State of Florida against the defendant and defendant believes that this court should not force counsel upon him who defendant does not trust.

8. That the defendant states that his foregoing motions to "Amend and Supplement State Habeas Corpus Petition" and "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-free, Substitute Counsel" raised numerous grounds, which demonstrate that he was deprived the effective assistance of counsel for his Direct Appeal

9. Because Mr. Collins refused to litigate the foregoing nineteen legal claims, which defendant raised in his foregoing Pro Se motions to "Amend and Supplement State Habeas Corpus Petition" and "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-free, Substitute Counsel" demonstrates that Mr. Collins' representation of defendant was ineffective and the defendant will be prejudiced by Mr. Collin's ineffectiveness.

10. That the defendant has a constitutional right to conflict-free, Substitute Counsel, since a defendant in a state, criminal trial has a right to substitute counsel under the six and fourteenth amendments to the Constitution, see (Crandell v. Bunnell, 144 F. 3d 1213 (9th Cir. 1998), there should be no reason why

the statutory right should not be also afforded to a defendant on appeal who faces execution as well. In U.S. v. Horton, 845 F.2d 1414 (7th cir. 1998) the law states that "once a defendant claiming ineffective assistance of counsel has shown that actual, conflict adversely affected his counsel's performance prejudice to defendant is presumed, and no further showing is necessary." This standard should also apply to Mr. Collin's performance on defendant's State Habeas Corpus Petition. His refusal to litigate defendant's meritorious legal claims demonstrates actual irreconcilable, conflict of interest and defendant was prejudiced by his deficient performance "An effective attorney must play the role of an active advocate, rather than a mere friend of the court." all osborn v. Shillinger 861 F.2d 617-25 (10th cir. 1988). Mr. Collins has not and will not advocate fearlessly and effectively on behalf of defendant Holland.

This court has an obligation to hold a "nelson Hearing" to inquire thoroughly into the factual and legal basis of defendant. dissatisfaction. see United States v. Hart, 557 F.2d 162 (8th cir. 1977).

Defendant Holland's 6th amendment right to counsel on appeal should not be impaired by Mr. Collin's irreconcilable, conflict of interest or Mr. Collin's divided loyalties see Wood v. Georgia, 450 U.S. 261, 101 S. Ct. 1097, 67 L.Ed.2d 220 (1981); Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L.Ed.2d 811 (1963)

established that an indigent criminal defendant has a right to appointed counsel counsel in his first appeal as of right in state court. see Evitts v. Lucey, 469 U.S. 387-96 105 S. Ct. 830-36, 83 L. Ed. 2d 821 (1985), held also that this right to appointed counsel in his first appeal as of right in state court encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right. Therefore, the State of Florida must assure that I being indigent be given an adequate opportunity to present my claims fairly in the context of the State's appellate process see Ross v. Moffitt 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

11. Mr. Collins's representation of defendant "falls below an objective standard of Reasonableness under prevailing professional Norms for capital cases." The irreconcilable conflict between mr. Collins and defendant is so great that it is preventing defendant from having an adequate and complete Habeas Corpus Petition. Mr. Collins has never made any reasonable effort to establish any relationship of trust or confidence with defendant and for these reasons defendant wants him dismissed (Removed) off his Capital Case. Mr. Collins's deficient performance in presenting defendant's legal claims in his State Habeas Corpus Petition is prejudicing his future postconviction, appellate proceedings. Mr. Collins has made choices of alternative

courses of action that favors interests in competition with defendants' interest. Mr. Collins has other interests and loyalties.

The nineteen legal issues that defendant asked Mr. Collins to include in his State Habeas Corpus Petition, because appellate Counsel failed to raise and properly preserve them on Direct Appeal are as follows:

1) Denial of defendant's right to Substitute Counsel, under Crandell v. Bunnell, 144 F.3d 1213 (9th Cir 1998) and cases cited therein.

2) Defendant's sixth and fourteenth amendment conflict of interest rights, under Cuyler v. Sullivan, 446 U.S. 335 100 S. Ct. 1708, 64 L.Ed. 2d 333 (1980) and cases cited therein.

3) Defendant's claims of denial of due process of law and miscarriage of justice, in conviction of an attempted Sexual Battery, a crime not charged in the indictment under Fla. R. Crim. P. 3.510 Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L.Ed. 644 (1998) and cases cited therein.

4) Defendant's claims that there was a fatal "variance" between the State's indictment and it's proof, because the facts proved by the State at trial differ from those alleged in the indictment. See U.S. v. Townsend, 924 F.2d 1385 (7th Cir. 1991) and cases cited therein.

5) Defendant's claims that trial judge "Abuse his discretion" in removing the "attempted felony-murder" element from defendant's indictment, since after an indictment has been returned, it's charge may not be broadened through amendment, except by Grand Jury itself, unde

Stirone v. United States, 80 S.Ct. 270 (1960) and cases cited therein.

6) Defendant's sixth and fourteenth amendment rights claims that all in-court identifications were tainted by pre-trial illegal showups under Gilbert v. State of California, 87 S.Ct. 1951 (1967), and that defendant was denied due process of law because pretrial showups were done without notice to counsel and in the absence of counsel and without first determining that they were of independent origin, under United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed. 2d 1149 and Edwards v. State, 538 So.2d 440 (Fla 1989); Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972) and cases cited therein.

7) Defendant's claims that convictions were founded upon statements, which were not properly determined to be voluntary, and which deprives defendant of due process of law under the 5th and 14th amendments, and that a hearing to determine voluntariness of confession was constitutionally mandated. see Jackson v. Denno, 84 S.Ct. 1774 (1964) and cases cited therein.

8) Defendant's claims that prosecutor impeached defendant's exculpatory story and insanity defense told for first time at trial by cross-examining defendant about his failure to have told the story after receiving Miranda Warnings at time of arrest, in violation of due process of law, under Doyle v. Ohio, 96 S.Ct 2240 (1976); State v. Bucwick, 442 So.2d 944 (19[illegible] and cases cited therein.

9) Defendant's claims that prosecutor ex-

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cluded qualified jurors on the basis of race and denied defendant equal protection of the law, under Batson v. Kentucky, 106 S. Ct. 1712 (1986), and cases cited therein.

10) Defendant's claims that being indigent he was denied funds necessary to employ expert witnesses to counter the prosecution's expert witnesses for insanity defense, DNA, finger-print evidence, Medical Examiner, Firearm's experts, and medical Doctors that treated both Thelma Johnson and Officer Scott Winters, since defendant made preliminary showing that his sanity at time of the offenses was likely to be a significant factor at trial, and therefore was denied due process of law, under Ake v. Oklahoma, 105 S. Ct. 1087 (1985), and cases cited therein.

11) Defendant's claims that he was denied fair trial and due process of law due to joint trial amounting to miscarriage of justice. That he had a right to a severance of offenses (charges) to promote a fair determination of defendant's guilt or innocence of each offense under Crosby v. State, 596 So.2d 447 (Fla. 1992); Griffin v. State, 662 So.2d 758 (Fla App. 4th Dist. 1995) and U.S. v. Nerssesian, 824 F.2d 1294 (2d Cir. 1987).

12) Defendant's claims that Detective Butler's testimony about statements defendant made to him was never used as impeachment evidence when defendant took the stand, but was admitted in the State's case-in-chief, and that "once warnings have been

given if individual indicates in any manner at any time prior to or during questioning that he wishes to remain silent, interrogation must cease," under Miranda v. Arizona, 86 S.Ct. 1602 (1966), because during the interview with Detective Butler, there are over 158 times where defendant declined or refused to answer Detective Butler's questions or defendant refused to speak to him at all thereby on each refusal to speak to him or answer him defendant was repeatedly invoking his right to remain silent, under United States v. Hernandez, 574 F.2d 1362 (1978), and cases cite therein.

13) Defendant's claims that the "evidence that the defendant gave police a false name (alias) that was used at the trial against him contributed to the convictions, under United States v. Poole, 794 F.2d 462 (9th cir. 1986), and cases cited therein.

14) Defendant's claims that he was denied an "attempted First-degree felony murder" jury instruction.

15) Defendant was denied a judgment of acquittal, because of the insufficiency of the evidence to support verdicts for: (a) attempted Sexual Battery; (b) attempted First-degree murder; (c) Robbery with a firearm; and (d) First-degree murder.

16) Defendant was denied a second-degree felony-murder jury instruction.

17) that defendant was illegally sentenced on all convictions.

18) that defendant was denied a jury instruction on all applicable penalties for each crime that defendant was charged, and what would happen to defendant if he were found "not guilty by Reason of Insanity." Wheeler 344 So2d 247

19) Defendant's claims that "Robbery by Sudden Snatching" became law in 1998 two years before defendant's Direct appeal was denied on October 6, 2000 and that the evidence in defendant's case supports the crime "Robbery by Sudden Snatching," and that the applicable law that is applied to a case on initial appeal is the law in effect at time of appeal. "Robbery by Sudden Snatching" is a second-degree felony. Wheeler v. State, 344 So2d 245.

Because of irreconcilable conflict and a complete breakdown in communication between mr. Collins and defendant good cause has been shown and will further be shown at a nelson Hearing to put this court on notice that different counsel must be appointed to represent defendant, because mr. Collins has failed to act as defendant's legal agent.

In conclusion, defendant states that this Honorable Court appointed mr. Collins to represent defendant throughout defendant's capital case and postconviction, appellate proceedings. All of the nineteen legal claims that defendant has stated in this motion and also that defendant asked mr. Collins to include in his State Habeas Corpus Petition that was filed on January 12, 2004 has merit and are fundamental errors denying

defendant due process of law, and because of appellate counsel's performance on defendant's Direct Appeal was deficient and the omissions are of such magnitude as to constitute serious errors and substantial deficiencies falling measurably outside the range of professionally acceptable performance and defendant was prejudiced, because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. All of the legal issues stated in this motion would in all probability have been found to have merit had appellate counsel raised these issues on defendant's Direct Appeal, and therefore appellate counsel's performance was ineffective.

Mr. Collins was legally bound and obligated to include each and every one of the nineteen legal claims stated in this motion and because of his incompetence defendant prays that this Honorable Court Removes (dismisses) him from defendant's capital case and post-conviction, appellate proceedings and appoint defendant competent, conflict-free, Substitute Counsel who will be willing to include and litigate all of defendant's legal issues that have merit in his State Habeas Corpus Petition. Defendant also prays that this court grants defendant a Nelson Hearing for all of the Reasons stated in this motion, and Recognizes the irreconcili

-able conflict stated in this motion.

For a more thorough, detailed analysis of the factual and legal aspects of the foregoing legal claims in this motion, please refer to:

(a) defendant's PRO SE "motion to Amend and Supplement the Record on Appeal 3.850 filed on September 22, 2002, in the circuit court of the 17th judicial circuit in and for Broward County, Florida, and

(b) letter that defendant wrote and sent to the Honorable Judge Charles M. Greene on February 21, 2003, in the circuit court of the 17th judicial circuit in and for Broward County, Florida, OR

(c) allow defendant to put on evidence at a nelson Hearing, OR

(d) Read defendant's "motion to Amend and Supplement State Habeas Corpus Petition" (PRO SE motion) that defendant filed on January 29, 2004 and January 26, 2004, OR

(e) Read defendant's PRO SE "Motion to Remove Conflict Counsel and to Appoint Competent, Conflict-free, Substitute Counsel", which defendant filed on February 23, 2004, in the Supreme Court of Florida.

## OATH/VERIFICATION

Under penalties of perjury, I Albert Holland, JR. declare that I have read the foregoing (document) and that the facts stated in it are true.

June 14, 2004
Date

Albert Holland JR.
Signature of Declarant

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing (document) has been furnished by the U.S. Mail—postage prepaid to: Thomas D. Hall, Clerk Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399

This 14th day of June, 2004.

Copies to:
Judge Charles M. Greene,
Debra Resigno, and
Bradley M. Collins,

Institution and address:
Albert Holland JR.
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-(4450)

DC2-527 (3/01)

In The Supreme Court of Florida

Albert R. Holland Jr.
Appellant

V.

State of Florida
Appellee.

Case no. SC03-1033
L.T. no. 90-15905 CF 10

Mr. Holland's Reply To Mr. Bradley M. Collins' "Response To Appellant/Petitioner's Pro se motion To Remove Conflict Counsel."

Comes now Mr. Holland, pro se and hereby replys to Mr. Collins' "Response To Appellant/Petitioner's Pro se Motion To Remove Conflict Counsel," and states as follows:

Appointed post conviction counsel Mr. Collins served Mr. Holland with a copy of his motion. In the aforesaid Response at page one Mr. Collins asserts that #1, he has diligently investigated and duly evaluated the potential postconviction claims herein, including those urged by Mr. Holland. Mr. Collins attempts to mislead this Honorable Court. If Mr. Collins had diligently investigated and duly evaluated all of Mr. Holland's legal claims that Mr. Holland included in his "Motion To Amend and Supplement 3.850 Motion To Vacate Judgment and Sentence" that he filed on September 22, 2002 and also the "Motion To Amend and Sup

plement State Habeas Corpus Petition" that Mr. Halland filed on January 20, 2004 and January 26, 2004, then Mr. Collins would have included all of those legal claims in the 3.850 "Motion To Vacate Judgment and Sentence" that he filed on Mr. Holland's behalf on September 17, 2002, or the "State Habeas Corpus Petition" that he filed on January 12, 2004, also on Mr. Holland's behalf, because the foregoing claims are fundamental errors, which amount to a denial of due process of law, and the ineffective assistance of trial counsel for not properly preserving them for Direct appellate Review. If Mr. Collins had diligently investigated and duly evaluated these claims then why would he not raise and argue (litigate) them in the "Motion To Vacate Judgment and Sentence" he filed and that's now on appeal to this court, the "Tainted Identification Testimony" that was admitted at Mr. Halland's trial? Prosecution Witness Abraham Bell identified Mr. Halland at trial as the perpetrator of the crimes which brought Mr. Holland to deathrow. But Mr. Bell (who has a felony conviction) testified in a deposition, under oath, on April 24, 1991 that "He can't remember whether the perpetrator had a beard or not, because everything was going so fast" "He wasn't staying to remember whether the perpetrator had a beard or not." "He remembered Mr Halland from his bushy hair down to his eyes and picked Mr. Halland out of a six-photo line-up, on July 30, 1990 the day after crimes were committed." Mr. Halland was arrested with a full beard. see Mr. Bell's deposition page 34.-

Betty Bonie, (who has three prior felonies,

identified Mr. Holland at trial as the perpetrator of said crimes. She first identified Mr. Holland in a "Showup" at the police station, without counsel for Mr. Holland being present and without notice to counsel. After testifying for the prosecution she left town and Mr. Holland's trial attorneys did not object or do anything in any way about this. When she did testify she committed perjury. Her statement she gave to police on July 29, 1990 the night of said crimes, contradicts her deposition under oath on June 20, 1991, and at Mr. Holland's first and second trials.

Roland Evleson identified Mr. Holland at the police station the night of said crimes without counsel present for Mr. Holland and without notice to counsel. In a deposition under oath he testified that "he never saw the perpetrator's face, but only in profile." "He judged his identification mainly by the hair, beard and build of the perpetrator. all pages 17, 18 of deposition April 25, 1991." Roland Evleson has prior felonies.

Prosecution witness Patricia Hearn testified on April 29, 1991 that "he saw a guy but not sure if he had a beard." "saw side of his face." "Saw only part of perpetrator's face," "from the right side." all page 12 of that deposition.

On October 7, 1996 in a deposition page 13, Patricia Hearn testified under oath that the perpetrator was five feet eight (nine) inches tall, thinks he had some facial hair. Mr. Holland

was addicted with a full beard and mr. Holland is six feet two inches tall.

Dorothy Horne, who was in the car with Patrick Horne, October 4, 1996 gave a deposition page 16 "didn't remember what the perpetrator looked like." Both Patrick and Dorothy Horne identified mr. Holland at trial as the perpetrator of said crimes.

Nikki Horne, October 3, 1996 page 8 deposition was in the car also "didn't remember the perpetrator's face," but she also identified mr. Holland in court (after waiting six years to come forward) as the perpetrator of said crime Dorothy Horne also waited six years to come forward.

The prosecution's own "Version of Events" presented at trial demonstrates that there was no way possible for any of the aforesaid eye-witnesses to have seen the perpetrator's face at the time of these crimes.

By not raising this issue in mr. Holland's 3.850 "Motion To Vacate Judgment and Sentence," because of trial counsel's failure to preserve this claim for Direct Appeal demonstrates that mr. Collins has <u>not</u> diligently investigated <u>nor</u> duly evaluated all of mr. Holland's legal claim.

In mr. Collin's "response motion" he does not state why he did not respond to mr. Holland's "motion To Discharge Conflict Counsel" filed on February 23, 2004.

mr. Collins asserts at page one #2. of his "Response" that he has communicated with mr. Holland before, during and after evidentiary

pleadings and prior to filing appellate briefs and habeas corpus pleadings on the claims, which in Mr. Collins' professional judgment may be advanced in good faith. This is untrue. Mr. Collins has not even sent Mr. Holland copies of State of Florida's "Answer Brief" or "Response To Mr. Holland's Petition For Writ of Habeas Corpus" as is required by Rule 1.080(a), and therefore Mr. Collins has failed to "Keep Mr. Holland Reasonably informed about the status of his appeal." see pages 2, 4, pro se motion.

Mr. Collins again attempts to mislead this Honorable Court at page two #3., Mr. Collins asserts that "Mr. Holland insists, however, that Mr. Collins must raise in these collateral proceedings claims, which if colorable, would comprise issues cognizable solely on direct appeal or claims refuted by the record facts and case authorities.") Mr. Holland has brought all of his legal claims to the attention of Mr. Collins and the Honorable Judge Charles M. Greene. Mr. Collins told Mr. Holland that all of the aforesaid claims were not cognizable on a 3.850 "motion To Vacate Judgment and Sentence." Please see letter Mr. Holland sent to Honorable Judge Charles M. Greene dated February 21, 2003. Said letter explains every thing in detail, so Mr. Collins cannot justify his actions (failing to act as Mr. Holland's legal agent) of not including all of Mr. Holland's claims in the "motion To Vacate Judgment and Sentence" and then now wants to justify his present actions by stating that the foregoing claims are not cognizable on a "Petition For

State Habeas Corpus Relief.") why tell Holland that the claims are not cognizable? If Mr. Collins did not want to litigate Holland's claims, why not just tell Holland that, instead of stating (lying) that Holland's claims are not cognizable in a "Motion To Vacate Judgment and Sentence?" Holland's trial counsel's ineffectiveness is so apparent from the record that appellate counsel should have considered it advisable to litigate Holland's contentions on direct appeal. see Massaro v. U.S., 123 S.Ct. 1690 (2003) at 1696.

Mr. Collins asserts at page two #4., that "Mr. Holland claims that Mr. Collins was legally obligated to make such claims in habeas proceeding and that Mr. Collins (or any attorney for that matter) cannot ethically raise them as there is no non-frivolous basis for doing so." Mr. Holland's claims are fundamental errors. 90.104 Rulings on Evidence states that "a court may take notice of fundamental errors affecting substantial rights even though such errors were not brought to the attention of the trial judge." also, Fed. R. Crim. P. 52 (b) states that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Mr. Collins asserts at page two #5., that Holland contends that "refusal to litigate these nineteen legal claims shows that a legal conflict exists" (Pro se motion, bottom of page 1), and that a "conflict of interest" does not arise when a criminal defendant simply does not agree with counsel's strategic decisions or legal reasoning

and mr. Collins cites "Black's Law Dictionary (8th ed. 2004)" definition of "Conflict of Interest." mr. Holland cannot and will not communicate with an attorney who mr. Holland does not trust or has any confidence in (Page four para se motion to discharge Collins), because mr. Collins is a liar. He's a proven liar. Just as he refused to litig-te the ineffectiveness of trial counsel on the afor-said "Identification Claim," he also refuses to send mr. Holland Statements and Depositions of the following witnesses that would help to pro-ve mr. Holland's innocence: Audrey Canion, Randolph Canion, Thelma Johnson, Fire Rescue personnel that responded to both crime scenes, officer Ca-brera, the medical doctors that treated both Thelma Johnson and officer Scott Winters, Patri-k Gayle, Detective Butler's deposition of November 30, 1990, and the paramedic that tried to help offi-cer Winters at the crime scene, Tyrone's Carter's deposition and others. mr. Collins is a liar. As stated earlier in this motion he didn't want to litigate mr. Holland's claims he should have sta-ted that to mr. Holland, but be close to be and tell mr. Holland that those claims were not cognizable in a "Motion To Vacate Judgment and Sentence." "a total lack of communication between mr. Holland and mr. Collins is the hallmark of an irreconcilable conflict." see U.S. v. Calderon, 127 F. 3d 1314, 1343 (11th cir. 1997).

mr. Collins asserts at page two #6, "instead every attorney must on their own responsibil-ty decide which contentions to make to the court, and may not escape that responsibility

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by following the client's instructions." citing McNealy v. State, 183 So. 2d 738 (Fla. 1st DCA 1966).

Mr. Collins is Mr. Holland's agent when acting or failing to act in furtherance of the post-conviction litigation, and Mr. Holland must bear the risk of Mr. Collins' errors. See Coleman v. Thompson, 501 U.S. 722, 753-54, 111 S. Ct. 2546, 2566-67 (1991) (applying agency law principles in a capital, postconviction proceeding). In Florida, one of the three elements of agency law is "control by the principle over the agent's actions." See Keys Jeep Eagle, Inc. v. Chrysler Corp., 897 F. Supp. 1437, 1442-43 (S.D. Fla. 1995). When a post-conviction defendant/petitioner directs his attorney to take a valid legal action, the attorney is not acting as petitioner's legal agent if the attorney fails to do as directed. See Clemmons v. Delo, 100 F.3d 1394, 1398-99 (8th Cir. 1996) ("The client, however, is and always remains the master of his cause").

Mr. Collins asserts at page Three #7, that "the Rules Regulating the Florida Bar, moreover, strictly prohibit attorneys from raising and arguing such baseless claims" and he cites Rule 4-3.1. Rule 4-3.1 also states that "such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail."

Mr. Collins asserts at page Three #8, that "it is difficult to provide a meaningful response to Mr. Holland's pro se motion to remove him as counsel based on what Holland char-

acterizes as a "conflict," as Mr. Collins has a duty to act ethically in Holland's defense while (as an officer of the court) proceeding in all candor. Mr. Collins does not want to respond to Mr. Holland's motion, because he does not want to commit himself and then get caught in a lie to this Honorable Court. And while Mr. Collins speaks about his duty to act ethically and proceeding in all candor, two Rules following Rule 4-3.1 of the Rules of Professional Conduct Rule 4-3.3. Candor Toward The Tribunal states (a) "False evidence; Duty to Disclose." "a lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (4) permit any witness to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures." Mr. Collins knows that the prosecutor Mr. Michael Saltz at Mr. Holland's trial knowingly presented false, perjured testimony and evidence, without taking Reasonable Remedial measures to correct it, in violation of Mr. Holland's rights to due process of law.

Mr. Collins asserts at page Three #9, that "as the State observed in its Response, this court has prohibited pro se motions alleging ineffectiveness of counsel, urging dismissal of appellate counsel, or seeking to supplement the issues"

citing Davis v. State, 789 So. 2d 978 (Fla. 200, The opinion in Davis, supra was from an appellant on "Direct appeal") from his death sentence. Also, Holland has never received a copy of the State's "Response" to Holland's foregoing pro se motions filed on February 23, 2004 and again on June 14, 2004, as is required by Rule 1.080 (a) "Unless the court otherwise orders, every pleading subsequent to the initial pleading and every other paper filed in the action, except applications for witness subpoena, shall be served on each party." Also, Mr. Holland never received any motion, pursuant to Rule 1.100(b) made in writing, stating with particularity the grounds therefor, and setting forth the relief or order sought by the State of Florida or pursuant to Rule 9.100(h) why relief should not be granted.

Mr. Collins asserts at page Three #10, that "There is no right to counsel in State, Collateral proceedings, see Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2567 (1990), and while this court has held pro se filings in direct appeal of capital cases in which there are claims of ineffective assistance of appellate counsel, requests to dismiss appellate counsel or which supplement bases for relief will be docketed and then stricken," see Davis v. State, 789 So. 2d at 981.

As Mr. Collins just argued and stated that Davis, supra, is an opinion of an appellant on "Direct appeal" from his death sentence. Mr. Collins is Mr. Holland's agent when acting on

failing to act in furtherance of the post-conviction litigation, and Mr. Holland must bear the risk of Mr. Collins's errors. all Coleman v. Thompson, at 501 U.S. 722, 753-54, 111 S. Ct. 2546, 2566-67 (1991) (applying agency law in a capital, post-conviction proceeding). Link v. Wabash R. Co., 370 U.S. 626, 634, 82 S. Ct. 1386, 1391, 8 L. Ed. 2d 734 (1962), states that "in our system of representative litigation ... each party is deemed bound by the acts of his lawyer-agent." Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 92 111 S. Ct. 453-56, 112 L. Ed 2d 435 (1990) states the same. "Master is subject to liability for harm caused by negligent conduct of servant within the scope of employment.

Mr. Collins is committing sabotage against Mr. Holland's appellate proceedings, because he refused to do what was requested by Mr Holland on such a fundamental matter, which violates a basic duty of an attorney to his client. all In Re agent Orange Prod. Liab. Litig., 800 F.2d 14, 17 (2d Cir. 1986). As a matter of professional responsibility an attorney owes a duty of loyalty to his client. This duty encompasses an obligation to defer to the client's wishes on major litigation decisions, and to provide competent representation to his client. Rule 4-1.7 states that "loyalty is an essential element in the lawyer's relationship to a client." Mr Collins has never made any reasonable effort to establish any relationship of trust or confidence with Mr. Holland.

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"The State of Florida must assure that I being indigent be given an adequate opportunity to present my claims fairly in the context of the State's appellate process." see Ross v. Moffit, 417 U.S. 600, 94 S.Ct. 2447, 41 L.Ed.2d 341 (1974).

Wherefore, Mr. Holland respectfully requests that this Honorable Court discharge Mr. Collins from any and all of Holland's future, post-conviction, appellate proceedings because of the irreconcilable conflict and Mr. Collins' failure to act as Mr. Holland's legal agent, because in the final analysis, "a lawyer's duty is always to the client."

Respectfully submitted,

Albert R. Holland, Jr.
D.O.C.# 122-651, P5210
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida 32026-4450

By: Albert R. Holland, Jr.

## OATH/VERIFICATION

Under penalties of perjury, I Albert R. Holland, Jr. declare that I have read the foregoing (document) and that the facts stated in it are true.

August 9, 2004
Date

Albert R. Holland, Jr.
Signature of Declarant

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing (document) has been furnished by the U.S. Mail—postage prepaid to: Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399

This 9th day of August, 2004.

Copies to:
Debra Rescigno.
Bradley M. Collins

Institution and address.

Albert R. Holland, Jr.
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-(4450)
D.O.C. #122-651

DC2-527 (3-01)

In The Supreme Court of Florida

FILED
2003 DEC 25 P 12:26
CLERK, SUPREME COURT

Case No. SC03-1033
L.T. No. 90-15905CF10A

Albert Holland, Jr.
Appellant

V.

State of Florida
Appellee

Mr. Holland's Supplemental Pleading To Mr. Holland's "Reply To Mr. Bradley M. Collins' 'Response To Appellant/Petitioner's Pro Se Motion To Remove Conflict Counsel'

Comes now Mr. Holland, pro se and hereby respectfully files this Supplemental Pleading in good faith.

Mr. Holland attaches a letter produced and signed by Mr. Collins, dated December 23 2002, which verifies and corroborates that Mr. Collins has no credibility and has not only deceived and lied to Mr. Holland but also to this Honorable tribunal, in violation of the Rules of Professional Conduct: Rule 4-3.3, "Candor Toward The Tribunal," (a) False Evidence; Duty to Disclose. A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal;

In Mr. Collins' Response to Mr. Holland's aforesaid pro se motion to Remove Conflict coun-

sel he states page two #4, that "whereas Holl-and claims the undersigned was 'legally obligated to make such claims in habeas proceedings, the undersigned (or any attorney for that matter) cannot ethically raise them as there is no non-frivolous basis for doing so.") But in Mr. Collins' aforesaid letter dated December 23, 2002, (two months after he filed Mr. Holland's Motion To Vacate Judgment and Sentence) he stated, "Please understand that many of the issues you have raised in your Motion to Supplement Record on Appeal Remain Viable in a Petition for Writ of Habeas Corpus in the Florida Supreme Court, should your motion for Post-Conviction Relief be denied...."

In Mr. Collins' aforesaid letter, his legal reasoning why Mr. Holland's legal claims were not cognizable in a motion for Post-Conviction Relief is ridiculous, because the law is very clear on each of those claims that Mr. Holland is entitled to relief, because his substantive and procedural, constitutional rights at trial were violated. Please see those motions to "Amend and Supplement 3.850 Record on appeal"; to "Amend and Supplement State Habeas Corpus Petition"; "Letter to Judge Richard Greene dated February 21, 2003" and "Motions to Remove Conflict Counsel" filed on February 23, 2004, and again on June 14, 2004, which contain the law and facts for all of Mr. Holland's legal claims.

Mr. Collins relied on Rule 3.850 (c) Florida Rules of Criminal Procedure, which expressly pro-hibits "Relief based upon grounds which could

have or should have been raised at trial and, if properly preserved on direct appeal of the judgment and sentence." But Mr. Holland has explained to Mr. Collins that the doctrine of fundamental error operates as a narrow exception to the general prohibition contained in Rule 3.850. To be fundamental error, the error must be one which amounts to a denial of due process of law. A fundamental error may be raised for the first time at any point, including in a post-conviction proceeding. See Willie v. State, 600 So. 2d 479 (Fla. App. 1st DCA 1992).

Mr. Collins misled Mr. Holland prior to and after December 23, 2002, that all of Mr. Holland's legal claims would be litigated in his Petition for State Writ of Habeas Corpus. All of Mr. Holland's legal claims must be cognizable in some forum or legal proceeding. Mr. Holland would like to know why they were not litigated.

Wherefore, Mr. Holland Respectfully Requests and prays that this Honorable Court Discharges Mr. Collins from any and all of Mr. Holland's future, post-conviction, appellate proceedings.

Respectfully Submitted,

Albert R. Holland, Jr.
D.O.C. # 122-651, P5210
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida 32026-4450

By: Albert R. Holland, Jr.

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## OATH/VERIFICATION

Under penalties of perjury, I Albert Holland, Jr. declare that I have read the foregoing (document) and that the facts stated in it are true.

August 23, 2004
Date

Albert Holland, Jr.
Signature of Declarant

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing (document) has been furnished by the U.S. Mail—postage prepaid to: Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399

This 23 day of August, 2004

copies to:
Debra Resigno,
Bradley M. Collins

Institution and address:

Albert Holland, Jr.
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-(4450)

DC2-527 (3-01)

To: the United States District Court: Southern district of Florida.

RE: To preserve Federal Review of State convictions and sentences.

06-20182
CIV - GOLD
MAGISTRATE JUDGE
WHITE

Dear Clerk of Court:

Comes now Albert R. Holland, JR., a Florida death row inmate and states that court appointed counsel has failed to undertake timely action to seek Federal Review in my case by filing a 28 U.S.C. Rule 2254 Petition For Writ of Habeas Corpus on my behalf.

Therefore Holland prays this honorable court take judicial notice and accept and consider this pro se action. Holland seeks federal review of his state convictions and sentences and hereby incorporates all claims previously raised in any appeal properly filed in any state court of Florida on Holland's behalf, including but not limited to the following claims:

Direct appeal Arguments

Point I

The trial court erred in denying Holland his right of self-representation on several occasions in violation of the 5th, 6th, 8th and 14th amendments to the U.S. Constitution. Faretta v. California, 422 U.S. 806, (1975);

Point II

VPB

The trial court erred in its instructions as to the intent requirement on felony murder and attempted Sexual battery, in violation of the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Vivelos v. State, 699 So.2d 822, 825 (Fla. 4th DCA 1997).

cat/d.v. Pade N 2254
Case # 06-20182-CIV
Judge Gold Mag. White
Motn Hip NO Fee pd $ NO
Receipt #

## Point III

The trial court erred in denying appellant's motion To Exclude the testimony of experts who had reviewed the Report of Dr. Stamos, in violation of Holland's right to Remain silent and due process of law pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Kastigar v. United States, 406 U.S. 441(1972).

## Point IV

The trial court erred in failing to recuse State Attorney Michael Satz and/or the State Attorneys office, denying Holland due process of law pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, United States v. Jenkins, 712 F.2d 891(3d Cir. 1973).

## Point V

The trial court erred in prohibiting the Redeposition of certain witnesses, denying Holland due process of law pursuant to the 5th, 6th, 8th and 14th amendments to the U.S Constitution.

## Point VI

The trial court erred in overruling appellant's objections to the admissibility of an inaudible videotape, denying Holla due process of law pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Carter v. State, 254 So.2d 230(Fla 1st DCA 1971).

## Point VII

The trial court erred in failing to suppress Holland's statements, violating Holland's right to counsel and right to remain silent pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Edwards v. Arizona, 451 U.S. 477 (1981).

## Point VIII

The trial court erred in admitting the hearsay testimony of Dr. Tate, denying Holland his right to due process of law and to confront adverse witnesses pursuant to the 5th 6th, 8th and 14th amendments to the U.S. Constitution, Palmieri v. State, 411 so. 2d 985 (Fla. 3d DCA 1982).

## Point IX

The trial court erred in denying the motion for judgment of acquittal as to Reinestitation, denying Holland due process of law, pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Weaver v. State, 220 so. 2d 53 (Fla. 2d DCA 1969).

## Point X

The trial court erred in allowing a state witness to testify as to speculation, denying Holland due process of law, pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Fino v. Nodine, 646 so. 2d 746 (Fla. 4th DCA 1994).

## Point XI

The trial court erred in using the wrong legal standard in rejecting mitigation, denying Holland due process of law, and subjecting him to cruel and/or unusual punishment pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution.

## Point XII

The trial court erred by making several factual errors in its evaluation of the testimony of defense mental health experts, denying Holland due process of law and subjected him to cruel and/or unusual punishment pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution.

## Point XIII

The trial court relied on a factual error in rejecting a statutory mental mitigating circumstance, denying Holland due process of law and subjected him to cruel and/or unusual punishment pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution.

## Point XIV

The trial court erred in failing to consider non-statutory mitigating circumstances supported by the evidence, violating the 5th, 6th, 8th and 14th amendments to the U.S. Constitution.

## Point XV

The trial court erred in allowing the state to bring out the facts of a prior offense of which Holland had been acquitted and which was not relevant denying Holland due process of law pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution.

## Point XVI

The trial court improperly used the attempted sexual battery to support two aggravating circumstances, denying Holland due process of law and subjected him to cruel and/or unusual punishment pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution.

## Point XVII

It was error to instruct the jury and to find the aggravating circumstance that the capital Felony was committed during a robbery, denying Holland due process of law and subjected him to cruel and/or unusual punishment pursuant to the 5th, 6th, 8th and 14th amendments to the U.S. Constitution.

## Point XIII

The trial court erred in allowing the use of victim impact evidence, denying Holland due process of law, subjected him to cruel and/or unusual punishment and to ex post facto laws in

violation of Article I, section 10 of the U.S. Constitution and the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Lynce v. Mathis, ___ U.S., 117 S.Ct. 891 (1997).

## Point XIX

The trial court erroneously applied a presumption of death, violating the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

## Point XX

The felony murder aggravating circumstance, (Florida Statutes 921.141(5)(d)) is unconstitutional on its face and as applied in this case, violating the 5th, 6th, 8th and 14th amendments to the U.S. Constitution, Zant v. Stephens, 456 U.S. 410 (1982).

## Point XXI

The death penalty is disproportionate violating the 5th, 6th, 8th and 14th amendments to the U.S. Constitution.

Appeal from the Circuit Court of the 17th Judicial Circuit in and for Broward County Florida

## Initial Brief of Appellant

### Argument

### Claim III of Holland's Rule 3.850 motion

The trial court's denial of claim III is not supported by competent substantial evidence as counsel conceded Holland's guilt without his authorization resulting in ineffective assistance of counsel, U.S. v. Cronic, 466 U.S. 648 (1984).

### Claim VIII

The trial court erred in denying claim VIII as defense counsel's failure to properly investigate evidence in mitigation denied Holland the effective assistance of defense counsel guaranteed by the 6th amendment during the Penalty Phase. Strickland v. Washington, 466 U.S. 668 (1984).

The trial court erred in Summarily denying claims I, II, III, V, VI and VIII as they are facially sufficient and not conclusively refuted by the Record, Flores v. State, 662 So. 2d 1350 (Fla. 2d DCA 1995).

### Claim I

alleges Holland's trial counsel was ineffective for failing to object to the admission of a police

officers opinion testimony, Jackson v. State 711 so. 2d 1371 (Fla. 4th DCA 1998).

Claim II

alleges counsel failed to object when in closing the state misstated evidence, argued matters not in evidence shifted the burden, vouched for the credibility of state witnesses, expressed personal belief in Holland's guilt, ridiculed Holland and his defense, engaged in inflammatory argument, accused the defense of denigrating witnesses and commented on silence, Jackson v. State, 711 so 2d 1371 (Fla. 4th DCA 1998).

Claim IV

alleges the cumulative effect of defense counsel's failures to object to the presentation of opinion testimony, failure to object to the states unfairly prejudicial arguments, and counsel's unauthorized concession of Holland's guilt of premeditated attempted 1st degree murder, rendered Holland's trial fundamentally unfair.

Claims II, VI and VIII

were lumped together by the trial court as alleging "that Holland's death sentence is unconstitutional as a judge determined the aggravating circumstance instead of a jury." Ring v Arizona, No. 01-488 (U.S. June 24, 2002).

Petition for State writ of Habeas Corpus

Grounds for Relief

Ground I

Appellate counsel was ineffective in failing to challenge the trial court's order excluding any reference to internal affairs records showing officer Winters reputation for using excessive force. Melvin v. State, 592 So.2d 356 (Fla. 4th DCA 1992).

Ground II

Appellate Counsel was ineffective for failing to raise or discuss the trial court's error in refusing to discharge trial counsel as Holland's claims that trial counsel were not being truthful to him or to the court went unrefuted. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1974). Faretta v. California, 422 U.S. 806 (1975).

Ground III

Appellate Counsel was ineffective for failing to raise or discuss the trial court's denial of additional peremptory challenges as Holland's Challenge for cause of a racially biased juror was improperly denied, Ross v. Oklahoma, 487 U.S. 81, 85 (1988).

a

## Ground IV

Appellate counsel was ineffective for failing to raise on appeal fundamental error addressing in the trial Court's unexplained increase in Holland's original sentence for armed robbery from 17 years to life imprison after Holland exercised his right to appeal; North Carolina v. Pearce 395 U.S. 711 (1969).

## Pro Se Filings including:

"motion To Supplement Record on appeal 3.850" September 22, 2002.

Letter to Honorable Judge Charles M. Greene, dated Friday, February 21, 2003.

August 7, 2003 "motion to amend and Supplement State Habeas Corpus Petition.")

August 18, 2003 "Motion to Amend and Supplement State Habeas Corpus Petition.")

January 20, 2004 "motion to Amend and Supplement State Habeas Corpus Petition.")

January 26, 2004 "motion to Amend and Supplement State Habeas Corpus Petition.")

February 23, 2004 "motion to Remove Conflict

Counsel and to appoint competent conflict free Substitute Counsel"))

June 17, 2004 "Motion to Remove Conflict Counsel and Requesting a Nelson Hearing.")

August 11, 2004 "Reply to Response"))

And August 25, 2004
"Supplement to Reply to Response"))

Further Holland prays this honorable court appoint counsel to represent him in this action. And grant a reasonable amount of time to amend this action. Holland does hereby affirm under penalty of perjury that the forgoing is true and correct.

Respectfully submitted this 19th day of January, 2005.

Albert R. Holland, Jr.
Albert R. Holland, Jr.
D.O.C. #122-651, P5210
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida 32026-4450

11

United States District Court
Southern District of Florida

Case no. 06-CV-20182

Nature of Suit: 530

Jurisdiction: Federal question

Cause: 28:2254 Petition For Writ of Habeas Corpus (State)

Albert Holland, Jr.,
Petitioner,

V.

State of Florida
Respondent,

Emergency Motion To Dismiss Conflict-Counsel And For Appointment of Conflict-Free Counsel

Comes now the petitioner Albert Holland, Jr., filing pro se, and pursuant to 18 U.S.C. § 3006A -(2)(B) and 21 U.S.C. § 848(q)(4)(B) moves this Honorable Court to discharge counsel Mr. Bradley M. Collins from further Representation of his capital case. In addition, petitioner Requests that conflict-free counsel be appointed to represent his case for the following Reasons:

1) Mr. Collins is doing everything within his power as counsel for petitioner, to have his 28 U.S.C. 2254 Habeas Petition time-barred.

2) Petitioner is not able to afford counsel.

3) There has never been any effective communication between Mr. Collins and petitioner. Except for a law case, which was sent to petitioner in July, 2005, up until January 19, 2006, Petitioner did not receive any communication from Mr. Collins, since July 2004, when he responded to petitioner's "Motion TO Discharge Counsel" filed in the Supreme Court of Florida. He will not accept "Collect telephone calls," and has not visited petitioner at this prison since September 13, 2002. Petitioner last saw counsel at an evidentiary hearing in April, 2003.

4) Mr. Collins has acted completely adverse to petitioner's interests. He failed to inform petitioner of the Supreme Court of Florida's denial of his postconviction appeals on November 10, 2005.

5) Petitioner instructed counsel to file his 2254 Habeas Petition, before the deadline to file it ran out (expired), but he refused to file the petition. Recently, Mr. Collins sent petitioner a letter dated January 31, 2006 stating that petitioner's conviction became final one year before he received the order appointing him to petitioner's case, and that the AEDPA's statute of limitations had already run (expired). Please see attached Exhibit A.

Aforesaid letter is the first time Mr. Collins or anyone else has ever brought this to petitioner's attention. Mr. Collins always led petitioner to believe that he would file said 2254 petition before the deadline.

On page 3 of petitioner's "Petition For A Writ of Certiorari to United States Supreme Court" filed January 31, 2006, Mr. Collins states that "on October 1, 2001 this court denied Holland's initial Petition For Writ of Certiorari," (which is when petitioner's case became final). Please see attached excerpt Exhibit B.

Mr. Collins has deceived and misled petitioner, as to when he would file his 2254 petition and has also misrepresented the law and facts, throughout said representation of petitioner's case.

6) Mr. Collins has allowed the State of Florida to "knowingly use false evidence and testimony" in order to prosecute petitioner's Capital case.

7) Petitioner filed "Motions To Discharge Conflict-Counsel Mr. Bradley M. Collins" dated February 23,

2004 and June 14, 2004, in The Florida Supreme Court, but motions were denied.

8) MR. Collins is now laboring under a conflict of interest and cannot argue all of petitioner's claims in this matter. He will be unable to argue the disputed factual and legal issues that will be presented to this court, and which will require a determination of credibility.

9) MR. Collins has not diligently investigated, evaluated nor researched the law pertaining to "AEDPA's one-year statute of limitations" and petitioner does not want to risk counsel's continuing to make egregious errors that will jeopardize and irreparably effect the outcome of his requests for relief.

10) Petitioner does not authorize or approve of MR. Collins taking any further action in this case, because he is not representing petitioner's best interests. He does not want him to provide any other legal service whatsoever now or in the future, regarding any proceeding in State or federal court.

11) The issues involved in this case are complex.

12) This prison limits the hours that petitioner may have access to the prison law library and the law materials contained there are very limited.

13) Petitioner had a limited knowledge of the law.

14) Under "Agency Law," Mr. Collins has failed to act as petitioner's agent.

15) The ends of justice would best be served in this case, if a conflict-free attorney is appointed to represent petitioner.

If this court decides not to appoint new counsel, petitioner Respectfully Requests that he be allowed to proceed pro se, pursuant to Title 28 U.S.C. 1654.

Therefore, petitioner prays that this Honorable Court will take immediate and appropriate action in this matter, in discharging Mr. Bradley M. Collins from any further representation of petitioner's Capital case and will appoint conflict-free counsel for petitioner.

United States District Court
Southern District of Florida

Albert Holland,
Petitioner,

V.

Case No. 06-20182-CIV-Seitz

State of Florida,
Respondent.

---

Pro se Rebuttal To State Postconviction Counsel Mr. Bradley M. Collins' "Response" To Court's "Order To Show Cause" Concerning Petitioner's Pro Se motion To Dismiss Counsel

Comes now petitioner Albert Holland, Jr. and rebuts State Postconviction Counsel Mr. Bradley M. Collin's "Response" To Court's "Order To Show Cause" concerning Petitioner's Pro Se Motion To Dismiss Counsel, and moves this Honorable Court to order Mr. Collins to address and explain the "Source of the Conflict between counsel and petitioner," as stated in aforesaid "Order To Show Cause," issued on March 29, 2006.

In this "Rebuttal," petitioner will first address and respond to Mr. Collin's "Response." Thereafter, petitioner will show that Mr. Collins did not fully comply with this court's "Order To Show Cause" issued on March 29, 2006.

1) On page one of Mr. Collin's "Response" he

20/CR

states" as mr. Holland had never provided the undersigned with a copy of his pro se petition, it was originally obtained electronically through the court's Pacer System."

The "Oath-Verification" and "Certificate of Service" attached to petitioner's "Motion To Dismiss Counsel" filed March 8, 2006, this court will see that copies were provided to: Assistant Attorney General Deborah Resigno and mr. Bradley M. Collins. Also, in a letter dated March 22, 2006, mr. Collins states "In view of your expressed desire to discharge me as your attorney, however, I am offering you two alternatives." Please see attached exhibit W. This proves that mr. Collins had a copy of petitioner's "Motion To Dismiss Counsel" one week prior to this court's March 29, 2006 "Order To Show Cause."

2) On page six of mr. Collin's "Response", he states "the undersigned completed the preparation of Holland's Federal Habeas Corpus Petition and mailed Holland a copy of the proposed Petition."

Mr. Collins prepared and submitted for petitioner's review a Federal Habeas petition two months and three days, after petitioner filed a "Pro Se" writ of Habeas Corpus Petition on January 19, 2006. Everything contained in mr. Collin's proposed petition is basically identical to petitioner's "Pro Se" petition. The only difference is mr. Collins typed up his petition. Please see above letter offering to file proposed petition and March 22, 2006 date. Please see attached exhibit W.

3) On page seven of Mr. Collin's "Response" he states "as for whether the undersigned's appointment by the State trial court for purposes of representing Mr. Holland in State Postconviction proceedings extends to and creates an appointment to represent Holland in Federal habeas corpus proceedings, it seems only this court has the ultimate authority to decide the matter of Mr. Holland's representation in this court." — "This court certainly has authority to discharge and appoint counsel notwithstanding provisions of state statutes.")

Mr. Collin's cover letter dated March 22, 2006, he states "Though the decision whether to allow me to withdraw ultimately lies with the trial court." Please see attached exhibit W.

4) On page eight of Mr. Collin's "Response", he states "Though never federally appointed to represent Mr. Holland in federal court, and without any arrangements for compensation for representation in federal habeas corpus proceedings, the undersigned has thoroughly investigated, researched, prepared and submitted for Mr. Holland's Review a Federal Habeas Corpus Petition containing the issues which in his professional judgment the undersigned deems exhausted in State Court and either legally defensible under the current state of the law or arguably capable of supporting a good faith basis for advocating a change in existing law.

Chapter 27 Florida Statutes

27.711 "Terms and conditions of appointment of attorneys as counsel in postconviction Capital collater-

al proceedings;" (h)(8) it states "However, if an attorney is permitted to withdraw or is otherwise removed from representation prior to full performance of the duties specified in this section, the trial court shall approve payment of fees and costs for work performed.

Rebuttal Evidence And Arguments Proving Mr. Collins did not Fully Comply With This Court's "Order To Show Cause" Issued March 29, 2006

Mr. Collin's "Response" does not address, or explain the following from petitioner's Pro Se Motion To Discharge Counsel:

a) Why there has never been any effective communication between Mr. Collins and petitioner. Except for a law case, which was sent to petitioner in July, 2005, up until January 19, 2006, petitioner did not receive any communication from Mr. Collins, since July, 2004, when he responded to petitioner's "Motion To Discharge Counsel" filed in the Supreme Court of Florida. He will not accept "Collect telephone calls", and has not visited petitioner at this prison since September 13, 2002. Petitioner last saw counsel at an evidentiary hearing in April, 2003. Please see Page 2 (Numbered 3*) Motion To Discharge Counsel filed March 8, 2006.

b) Why Mr. Collins has acted completely adverse to petitioner's interests. He failed to inform petitioner of the Supreme Court of Florida's denial of his postconviction appeals on November 10, 2005. Please see page #2 (number 4#) motion TO Discharge Counsel filed March 8, 2006.

c) Why after petitioner instructed counsel to file his 2254 Habeas Petition, before the deadline to file it ran out (expired), he refused to timely file the petition. Why Mr. Collins sent petitioner a letter dated January 31, 2006, stating that petitioner's conviction became final one year before he received the order appointing him to petitioner's case, and that the AEDPA's statute of limitations had already run (expired). Please see page #3 (number #9) motion TO Discharge Counsel filed March 8, 2006. Please also see Attached exhibit A of "Motion TO Dismiss Counsel."

Aforesaid letter is the first time Mr. Collins or anyone else has ever brought this to petitioner's attention. Mr. Collins had always led petitioner to believe that he would file said 2254 petition before the deadline.

d) Why Mr. Collins has deceived and misled petitioner, as to when he would file his 2254 petition and has also misrepresented the law and facts, throughout said representation of petitioner's case.

e) Why Mr. Collins has allowed the State of Florida to "knowingly use false evidence and testimony" in order to prosecute petitioner's capital case.

please see page #3 (Number #6) motion To Discharge Counsel filed March 8, 2006.

f) why under "Agency law," mr. Collins has failed to act as petitioner's agent. Please see page #5 (number #14) motion To Discharge Counsel filed March 8, 2006.

Please see all attached exhibits with Pro Se "motion To Discharge Court-appointed Counsel" filed March 8, 2006.

Please also see attached exhibits: Q, R, S, T, U, V, and W with this "Rebuttal" To mr. Bradley m. Collin's said "Response."

Exhibit Q attached to this "Rebuttal," is a prison record of a visit from an attorney named Susan Cary. She routinely visits all deathrow prisoners. Her visit was scheduled for August 8, 2002.

Mr. Bradley m. Collins does not want to get caught in a lie to this court. Mr. Collins has already knowingly lied to the Florida Bar association. Please see exhibit W and also exhibits R, S, T, U, V.

Please see exhibit U. I never complained about mr. Kenneth Delegal who was first appointed to represent me at trial, until I found out he was using crack cocaine while representing me and eventually

he died prior to petitioner's trial. Please see exhibit U page #2. Also, exhibit U page #2 mr. Collins stated (top of the page) "all orders and motions have been forwarded to mr. Holland."

If this court reviews attached exhibits: R, S, T and V of this "Rebuttal" and also reviews prison records (exhibits) attached to petitioner's "Motion TO Discharge Counsel," this court will clearly see that mr. Collins lied to the Florida Bar association in his "Response" to petitioner's "Bar Complaint." Please see exhibit U, dated March 21, 2006.

Wherefore, for all the reasons and arguments stated in this "Rebuttal" TO State Post-conviction Counsel mr. Bradley m. Collin's "Response" TO Court's "ORDER TO Show-Cause" Concerning petitioner's Pro Se Motion TO Dismiss Counsel, petitioner prays this Honorable Court orders mr. Collins to address and explain the "Source of the Conflict between Counsel and petitioner," as stated in this court's "ORDER TO Show-Cause" issued March 29, 2006.

## OATH/VERIFICATION

Under penalties of perjury, I Albert Holland, Jr. declare that I have read the foregoing (document) and that the facts stated in it are true.

May 23, 2006
Date

Albert Holland, Jr.
Signature of Declarant

## Certificate of Service

I hereby certify that a true and correct copy of the foregoing "Rebuttal" has been furnished by the U.S. Mail - postage prepaid to: (1) assistant attorney general Debra Resugno, 1515 N. Flagler DR., Suite 900, West Palm Beach, FL. 33401, (2) Mr. Bradley M. Collins P.A. 600 South andrews avenue, Suite 500, Ft. Lauderdale, FL. 33301, (3) Clerk of the United States District Court, Southern District of Florida, 301 N. miami avenue, miami, Florida 33128 and (4) Honorable Judge Patricia A. Seitz, United States District Court, Southern District of Florida, 301 N. miami avenue, miami, Florida 33128, and (5) CCR-South, 101 N.E. 3rd ave., Suite 400, Ft. Lauderdale, FL 33301.

This 23 day of May 2006.

Albert Holland, Jr.

05 NOV 22 PM 2:36
CLERK U.S. DIST. CT.
S.D. OF FL.-MIAMI

**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

**ALBERT HOLLAND,**

Petitioner,

v. CASE NO. 06-20182-CIV-SEITZ

**JAMES MCDONOUGH,**
**ET. AL.,**

Respondent.
_____/

**PETITIONER'S APPENDIX**

**COMES NOW THE PETITIONER,** by and through his undersigned CJA counsel, and herein submits the attached Appendix to his Reply. This Court previously permitted Petitioner to conventionally file this Appendix.

Respectfully submitted,

TODD G. SCHER
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue #15-B
Miami Beach, FL 33140
(305) 861-9252 (tel)
(305) 861-9253 (fax)
CJA Counsel for Petitioner

# APPENDIX G

D.O.C. # 122-651
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida 32026-4440

July 18,
2003

Exhibit
K

To whom it may
concern:

How are you? Fine / hope.

my 3.850 motion to Vacate Judgment and sentence was denied on may 16, 2003. I'm a death row prisoner and I have at least (20) twenty to (25) twenty-five legal issues that have merit but my postconviction attorney does not want to raise any of these legal claims, that have merit when he files my State Writ of Habeas corpus to the Florida Supreme Court.

all my legal issues are Fundamental errors that denied me Due Process of Law, and fundamental errors can be raised at any time.

What can I do to get all my legal issues before the Florida Supreme Court so that I can exhaust State remedies, so that my legal claims will not be procedurally barred when I get to the Federal Courts?

These issues could have been raised at my direct appeal, but also on my initial "3.850 motion to Vacate Judgment and Sentence." but also on my

Please help me.

I have enclosed an envelope with a

37¢ postage stamp on it, so that you can write me back as soon as your time permits and as soon as possible.

We all need a jumpstart at times. A kind word, some encouragement, or just a helping hand to help us to get over a rough spot in life. I feel all and will be crucial times when we all need help, so if nothing else, please write me back to let me know that your office has at least received this letter and has also considered it's contents.

Thank you very much.

Please have a nice day.

Sincerely Yours,

Albert Holland, Jr.

Albert Holland, JR.
D.O.C. # 122-651

TALLAHASSEE BRANCH
2003
REC

# APPENDIX K

D.O.C. # 122-651, P5210
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida 32026-4450

March 3, 200

Exhibit B

RECEIVED BY
UNION CORRECTIONAL INSTITUTION
FOR MAILING

Dear Mr. Collins, P.A.:

How are you? Fine I hope.

I write this letter to ask that you please write me back, as soon as possible to let me know what the status of my case is on appeal to the Supreme Court of Florida.

If the Florida Supreme Court denies my 3.850-3.851 and State Habeas Corpus appeals, please file my 28 U.S.C. 2254 Writ of Habeas Corpus petition, before my deadline to file it runs out (expires).

Thank you very much.

Please have a nice day.

Sincerely yours,

Albert Holland, Jr.

Albert Holland, Jr.

Exhibit B

# APPENDIX L

Albert Holland, Jr.
D.O.C.# 122-651, P5210
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida 32026-4450

June 15, 2005

Exhibit B

Dear Mr. Collins:

How are you? Fine I hope.

On march 3, 2005 I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.

Also, have you begun preparing my 28 U.S.C. §2254 Writ of Habeas Corpus Petition? Please let me know, as soon as possible.

Thank you.

Sincerely yours,

Albert Holland, Jr.

Albert Holland, JR.

Exhibit B

RECEIVED BY UNION CORRECTIONAL INSTITUTION FOR MAILING 6-15-05 Albert Holland

# APPENDIX Q

D.O.C.#122-651, P5210
Union Correctional Institution,
7819 NW 228th Street,
Raiford, Florida 32026-4450

January 9,
2006

ION CORRECTIONAL INSTITUTION

Dear Mr. Bradley M. Collins:

[redacted] Albert Holland, 1-9-06
FOR M[illegible]G

How are you? Fine I hope.

I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. Have my appeals been decided yet?

Please send me the date when the "mandate" was issued in my case. If you could, please also send me a copy of said "mandate" so that I can determine when the deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable "Antiterrorism and Effective Death Penalty Act" if my appeals before the Supreme Court of Florida are denied.

Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.

Mr. Collins, would you please also inform me as to which United States District Court my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition will have to be timely filed in and that court's address?

Thank you very much.

Sincerely,

Albert Holland, Jr.

Albert Holland, Jr.

Exhibit B

# APPENDIX V

D.O.C.# 122-651, P5210
Union Correctional Institution,
7819 NW 228th Street,
Raiford, Florida 32026-4450

January 20, 2006

Dear Mr. Bradley M. Collins:

How are you? Fine I hope.

I notice in your recent correspondence to me dated January 19, 2006 (when I received it), you indicate that you want me to fill out and sign this "Affidavit OR Declaration In Support of Motion For Leave To Proceed In Forma Pauperis" (which I have), so that you can proceed to the United States Supreme Court on Certiorari.

Since Recently, the Supreme Court of Florida has denied my 3.851 and State writ of Habeas Corpus Petition. I am left to understand that you are planning to seek Certiorari on these matters.

It's my understanding that the AEDPA time limitations is not tolled during discretionary appellate reviews, such as certiorari applications Resulting from denial of State Post Conviction proceedings.

Therefore, I advise you not to file certiorari if doing so affects OR jeopardizes my one year grace period as prescribed by the AEDPA.

Thank you very much.

Sincerely,
Albert Holland, Jr.
Albert Holland, JR.
D.O.C.# 122-651

Exhibit B

RECEIVED BY
UNION CORRECTIONAL INSTITUTION
Albert Holland Jr. 1-20-06
FOR MAILING

# APPENDIX W

D.O.C. # 122-651 P5210
Union Correctional Institution,
7819 NW 228th Street,
Raiford, Florida 32026-4450

January 27, 2006

Dear Mr. Bradley M. Collins:

How are you? Fine I hope.

On Tuesday, January 26, 2006 the prison officials allowed me to call your office at 9:42 a.m. Someone in your office refused to accept the telephone charges.

Mr. Collins, please inform me of the present status of my case on appeal. What have you filed? Please send me a copy of what you have filed on my behalf.

I've written you two letters but you have not responded to them yet. Please respond.

Thank You.

Sincerely,

Albert Holland
Albert Holland

Exhibit B

RECEIVED BY
UNION CORRECTIONAL INSTITUTION

January 27-06 Albert
FOR MAILING Holland
D.O.C. 122-6

# APPENDIX X

D.O.C. #122-651/P5210
Union Correctional Institution,
7819 NW 228th Street,
Raiford, Florida 32026-4450

January 30, 2006

FOR MAILING

Albert Holland January 30 2006

RECEIVED BY
UNION CORRECTIONAL INSTITUTION

Dear Mr. Collins:

How are you? Fine I hope.

I've enclosed a few case citations that demonstrate why the "time during which a petition for writ of certiorari is pending, or could have been filed, following denial of state post-conviction relief is not subtracted from running of one-year time period for filing of federal habeas petition for 28 U.S.C. § 2244(d)(2) statute of limitations purposes." (1)

The citations are as follows:

1) Lawrence v. Florida, 421 F.3d 1221 (11th cir. 2005)

2) Steed v. Head, 219 F.3d. 1298 (11th cir. 2000)

and

3) Coates v. Byrd, 211 F.3d 1225 (11th cir. 2000).

Exhibit B

Sincerely,

Albert Holland, Jr.

Albert Holland, Jr.

# APPENDIX Z

D.C.# 122-057, P6210
Union Correctional Institution,
7819 NW 228th Street,
Raiford, Florida 32026-4460

February 9, 2006

Exhibit J

Dear Mr. Collins:

I Received your letter dated January 31, 2006. You are incorrect in stating that "the one-ye statutory time frame for filing my 2254 petition began to run after my case was affirmed on Octo 5, 2000, by the Florida Supreme Court." As stated o page three of my Petition For a writ of Certiorari October 1, 2001 is when the United States Supreme Court denied my initial petition for writ of certio -ari and that is when my case became final. Tha meant that the time would be tolled once I filed my 3.850-3.851 motion in the trial court.

Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely fi my 28 U.S.C. 2254 Habeas Corpus Petition before t deadline, so that I would not be time-barred.

You never informed me of Oral arguments on of the Supreme Court of Florida in November 10, 200 decision denying my postconviction appeals. You never kept me informed about the status of my case, although you told me that you would immediately inform me of the Court's decision as soon as you heard anything.

Mr. Collins, I filed a motion on January 19, 2006 to preserve my rights, because I did not want to be time-barked. Have you heard anything about the aforesaid motion? Do you

Please see 2 →

know what the status of aforesaid motion is?

Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting anymore time. (valuable time).

Again, please file my 2254 Petition at once.

Your letter is the first time that you have ever mentioned anything to me about my time had run out, before you were appointed to represent me, and that my one-year started to run on October 5, 2000.

Please find out the status of my motion that I filed on January 19, 2006 and let me know.

Thank you very much.

Sincerely,

Albert Holland, Jr.

Albert Holland, Jr.

Exhibit
J

# PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
DEC 23 2009
OFFICE OF THE CLERK

No. 09-5327

B080

In The

# Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner,*

vs.

STATE OF FLORIDA,

*Respondent.*

**On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Eleventh Circuit**

## PETITIONER'S BRIEF ON THE MERITS

TODD G. SCHER
*(Counsel of Record)*
LAW OFFICE OF TODD G. SCHER, P.L.
5600 Collins Avenue #15-B
Miami Beach, FL 33140
(305) 861-9252

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BOTH 5AVN74

## CAPITAL CASE
## QUESTION PRESENTED

Whether "gross negligence" by collateral counsel, which directly results in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling, or whether, in conflict with other circuits, the Eleventh Circuit was proper in determining that factors beyond "gross negligence" must be established before an extraordinary circumstance can be found that would warrant equitable tolling?

## PARTIES TO THE PROCEEDING

All the parties to the proceeding are listed on the cover of the brief.

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## OPINIONS BELOW

The Eleventh Circuit's opinion, 539 F.3d 1334 (11th Cir. 2008), is reproduced at J.A. 102-112. The district court's order dismissing Holland's habeas corpus petition is reproduced at J.A. 81-94.

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The Eleventh Circuit entered its judgment August 18, 2008, J.A. 102-112, and denied Holland's timely petition for rehearing and rehearing *en banc* January 13, 2009. Pet. App. B. Justice Thomas granted a 30-day extension; Holland filed his petition for certiorari May 13, 2009; this Court granted it October 13.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(d) provides:

> (1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in state custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct

> review or the expiration of the time for seeking such review;
>
> . . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

## STATEMENT OF THE CASE

Fearing that his federal habeas corpus petition would be filed after the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations expired, Albert Holland repeatedly pled with his appointed attorney, Bradley Collins, not to miss the deadline, and sought the assistance of the Florida Courts, the Florida Bar, and other individuals in his quest not to be denied federal review of his claims. On January 18, 2005, through the writ room at Union Correctional Institution (UCI),[1] Holland discovered that all of his efforts had been in vain.

[1] At UCI, death row prisoners have access to a writ room, or library of sorts. However, inmates are not allowed free or consistent access to the writ room; they must ask for and receive permission to visit for a specified period of time. Death row inmates have no computer or online access. J.A. 104.

There, Holland learned for the first time that the Florida Supreme Court had, over two months earlier, affirmed the denial of his state motion for post-conviction relief and denied his petition for a writ of habeas corpus. He discovered that the mandate had issued on December 1, 2005, over six weeks earlier, triggering the re-commencement of his AEDPA statute of limitations. J.A. 105. He realized that the time to file his federal habeas petition had expired and, "despite [] repeated instructions to do so," Collins had "fail[ed] to file a federal habeas petition timely." J.A. 110. Collins had never told Holland about either the Florida Supreme Court's ruling or its mandate.

Distraught, Holland immediately wrote a *pro se* federal habeas corpus petition in longhand and mailed it to the United States District Court for the Southern District of Florida the following day, January 19, 2006. J.A. 181-191. The district court ultimately dismissed the petition on statute of limitations grounds. J.A. 81-94. As the following chronology demonstrates, Holland repeatedly, but futilely, sought to keep his federal habeas corpus rights alive at all stages of his state and federal court litigation.

### A. The State Court Proceedings.

The Florida Supreme Court decided Holland's direct appeal October 5, 2000, *see Holland v. State*,

773 So.2d 1065 (Fla. 2000),[2] and this Court denied certiorari October 1, 2001. *See Holland v. Florida*, 534 U.S. 834 (2001). Holland then had 365 days to file a federal habeas petition, unless the time was tolled by a properly-filed state postconviction petition. *See* 28 U.S.C. §§2244(d)(1)(A); (d)(2).

Attorney Collins was appointed to represent Holland in postconviction proceedings on November 7, 2001.[3] Collins filed a state postconviction motion pursuant to Fla. R. Crim. P. 3.851 on September 17, 2002, 317 days after he had been appointed and 351 days into the one-year statute of limitations. This filing tolled the statute, *see* 28 U.S.C. §2244(d)(2), and left 14 days to file the federal petition once relief was denied. After the Florida Supreme Court's mandate

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[2] Holland had been indicted in August, 1990, in Broward County, Florida, on four criminal counts, including one count of first-degree premeditated murder. He was convicted and sentenced to death. On direct appeal, the Florida Supreme Court reversed and remanded for a new trial. *Holland v. State*, 636 So.2d 1289 (Fla. 1994). On retrial, he was again found guilty and, at a penalty phase, the jury recommended a death sentence by an 8-4 vote. The state trial court sentenced him to death.

[3] Collins was appointed pursuant to Fla. Stat. §27.711 (2005), from a list of attorneys called the "Registry." Pursuant to §27.711(2), an appointed attorney must "immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant throughout all postconviction capital collateral proceedings, *including federal habeas corpus proceedings*, in accordance with this section or until released by order of the trial court." (emphasis added).

issued on December 1, 2005,[4] Holland – who did not know that the mandate had issued or that the Florida Supreme Court had earlier decided his cases – had until December 15, 2005, to file his federal habeas petition within the statutory deadline.

### 1. Holland's Vigilance in State Post-conviction Circuit Court.

Holland had repeatedly stressed to Collins his overarching concern that his claims be preserved for federal habeas proceedings and, specifically, that his federal habeas petition be timely filed. Collins reassured him. For example, in June, 2002, Collins responded to a letter from Holland:

> I would like to *reassure* you that we are aware of state time-limitations and federal exhaustion requirements. . . . Our trust and confidence in one another is essential.

J.A. 55. Collins wrote another letter to Holland on December 23, 2002, stating that once the issues in

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[4] There are factual errors in the Eleventh Circuit's opinion regarding some of the relevant dates. Holland's state post-conviction motion was filed on September 17, 2002 (not September 19, 2002). J.A. 103. Because of this error, the Eleventh Circuit wrongly determined that Holland's state postconviction motion was filed 353 days after this Court denied certiorari. J.A. 107. Rather, it was filed 351 days after the denial of certiorari. That left Holland only 14 days to timely file a federal habeas corpus petition once the Florida Supreme Court issued the mandate, or until December 15, 2005.

state court were exhausted, all his legal issues "will then be ripe for presentation in a petition for writ of habeas corpus in federal court." J.A. 61. Collins assured Holland of his intent to "assert each and every one of [his] viable legal claims in order to enforce [his] substantive and procedural constitutional rights to the fullest extent of the law" and asked for Holland's "complete confidence and support as we litigate your case to the state *and federal trial and appellate courts.*" J.A. 62 (emphasis added).[5]

Despite Collins' assurances, Holland remained vigilant. For example, shortly after Collins filed Holland's state postconviction motion Holland filed a *pro se* motion to supplement the record with thirteen additional grounds for relief. The State moved to strike the motion as a "nullity," arguing that Holland "has no Sixth Amendment right to represent himself, and, at the same time, to have the assistance of counsel." J.A. 9 (citing cases). This argument was reinforced by the State at a later hearing, and the circuit court agreed and struck Holland's pleading. J.A. 14.[6] Following this hearing, Collins wrote to Holland that his office had researched Holland's *pro*

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[5] Collins would later tell Holland, falsely, that the statute of limitations for filing his federal habeas corpus petition had expired before Collins was even appointed to represent Holland. J.A. 79.

[6] At this hearing, Collins acknowledged that Holland's *pro se* motion raised "some points . . . that may be properly raised" and he adopted Holland's *pro se* issues. J.A. 13.

*se* claims and that "many of the issues you have raised . . . remain viable in a petition for writ of habeas corpus in the Florida Supreme Court[,]" a pleading which would be filed simultaneously with the appellate brief in the event of an appeal to the Florida Supreme Court from the denial of postconviction relief. J.A. 57-61.[7]

Holland continued to be vigilant, writing again to Collins in early January, 2003, to ask about the status of his case. Collins responded that the circuit court was considering whether to grant an evidentiary hearing. J.A. 63-64. Collins closed with "I trust we can move forward with your confidence and a sense of unity in approaching this very delicate matter." J.A. 64.

An evidentiary hearing was scheduled for April 10, 2003. Holland had prepared another *pro se* filing (a letter) containing issues he wanted included in his postconviction motion. J.A. 16. At the beginning of the hearing, Collins brought this pleading to the court's attention and stated that although Collins thought he had presented appropriate grounds for

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[7] In Florida, claims of error on direct appeal, including claims of ineffective assistance of appellate counsel, may be raised only in a state habeas corpus petition filed directly in the Florida Supreme Court. *See, e.g. Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985). This petition is filed along with the Initial Brief on the appeal from denial of a postconviction motion. *See* Fla. R. App. P. 9.142(a)(5) (2008); *Mann v. Moore*, 794 So.2d 595, 598 (Fla. 2001).

relief, Holland "has some of his own things he wants to raise." J.A. 17. However, the judge indicated that "the issue, unfortunately, with Mr. Holland is that Mr. Holland is represented by counsel. . . . And the period of time in which to file a petition has already expired. The State has responded. . . . The pleadings at this juncture are closed." *Id.*

On May 16, 2003, the state circuit court denied relief, and a timely appeal was taken to the Florida Supreme Court in June, 2003.

### 2. Holland's Vigilance on Postconviction Appeal.

#### a. Please let me "know exactly what is happening with my case on appeal to the Supreme Court of Florida."

On June 9, 2003, Holland's appeal was docketed in the Florida Supreme Court. District Court Docket Entry 38 at 31 (hereinafter DE). On July 18, 2003, Holland mailed a grievance to the Florida Bar explaining that he had a number of legal issues that his "attorney does not want to raise" and asking "What can I do to get all my legal issues before the Florida Supreme Court so that I can *exhaust state remedies*, so that my legal claims will not be procedurally barred when I get to the Federal Courts?" J.A. 207-208 (emphasis added).[8]

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[8] The Florida Bar did not initiate an investigation and did not request that Collins respond. J.A. 65-66.

On August 7, 2003, Holland, mistakenly believing that a state habeas corpus petition had been filed,[9] filed a *pro se* motion in the Florida Supreme Court purporting to amend and supplement it with additional issues. J.A. 113-121. As it had done and would do with all of Holland's *pro se* filings, the State moved to strike this *pro se* motion as unauthorized because Holland was represented by counsel. J.A. 19-21. While the motion to strike was pending, Holland wrote to the Florida Supreme Court Clerk requesting information about the status of his appeal, when the appeal was filed, when the record was to be filed, and the due date for the brief and state habeas petition.[10] J.A. 122. On September 11, 2003, the Clerk wrote Holland and answered only his specific questions. J.A. 22. On October 30, 2003, the Florida Supreme Court granted the State's motion to strike Holland's *pro se* motion as "unauthorized," but without prejudice for him to re-file pursuant to Fla. R. App. P. 9.142(a)(5). J.A. 24. *See supra* note 7.

On November 17, 2003, Holland again contacted the Clerk for a "status inquiry" and requested copies of his *pro se* motions which had been stricken. DE38 at 32. On November 20, 2003, Holland again

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[9] *See supra* note 7.

[10] Holland turned to the Florida Supreme Court for an update because "I have not heard from my post-conviction appellate attorney since he filed my Notice of Appeal. I wrote him a letter a couple of months ago, but he has not responded to my letter yet." J.A. 122.

contacted the Clerk to request a copy of the State's motion to strike and to inquire as to when his brief was due. J.A. 123-124. On December 3, 2003, the Clerk responded, providing a copy of the requested document and informing Holland when his brief was due. J.A. 25.

On January 9, 2004, Collins filed the Initial Brief and a Petition for Writ of Habeas Corpus, DE38 at 32, 37, and mailed them to Holland. Pursuant to the Court's earlier ruling, J.A. 24, Holland re-filed his *pro se* motion to amend and supplement the state habeas petition. J.A. 125-133. He was met **again** with a motion to strike by the State arguing that the pleading was a "nullity" because Holland had counsel. J.A. 27-29. The Florida Supreme Court **again** struck Holland's pleading on February 4, 2004. J.A. 30.

Having been repeatedly rebuffed in his efforts to have his issues presented so that they would be exhausted for federal review, Holland filed a *pro se* motion in the Florida Supreme Court on February 23, 2004, requesting that the Court remove Collins and appoint substitute counsel because Holland lacked confidence in Collins' ability to represent him. J.A. 134-145. **Again**, the State moved to strike the *pro se* motion, arguing that Holland was not authorized to file it while represented by counsel. J.A. 31-34.

Because Collins did not send Holland the State's motion to strike, the State's Answer Brief, or the State's Response to the State Habeas Corpus Petition, Holland requested copies of them from the Florida Supreme Court on April 26, 2004, so that he could

"know exactly what is happening with my case on appeal. . . ." J.A. 146-148.[11] The Clerk responded on May 5, 2004, informing Holland, who was indigent, that he would have to pay for copies by "submitt[ing] a check or money order in the amount of $77.00 made

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[11] Specifically, Holland wrote:

> Mr. Hall, I have not yet received a copy of the Appellee's (State of Florida's) answer brief in response to the brief my post-conviction, appellate attorney Mr. Bradley M. Collins filed in behalf of me on January 12, 2004. I also have not received a copy of Mr. Bradley M. Collins Reply brief to the Appellate "Answer Brief."
>
> Mr. Hall would you please be kind enough to send me copies of the appellee's forgoing "Answer brief," Mr. Bradley M. Collins "Reply brief," and a copy of the appellee's or Mr. Bradley M. Collins's response to my pro se "Motion to Remove Conflict Counsel and to appoint Competent, Conflict-Free Substitute Counsel," and if possible the Supreme Court of Florida's Ruling on my "Motion to Remove Conflict Counsel and to appoint Competent, Conflict-Free, Substitute counsel?"
>
> Mr. Hall, because I know and understand how busy you must be, I decided to wait until I believed that all of the foregoing legal documents have been filed before writing you this letter, instead of writing separate letters asking for each copy individually. I decided to include everything in one letter.
>
> Mr. Hall, if I had a competent, Conflict-Free, post-conviction appellate attorney representing me I would not have to write you this letter. I'm not trying to get on your nerves. I just would like to know *exactly what is* happening with my case on appeal to the Supreme Court of Florida.

J.A. 146-147 (emphasis in original).

payable to 'Clerk, Florida Supreme Court.'" J.A. 36.[12] On the same day as the Clerk's response, the Florida Supreme Court **again** granted the State's motion to strike Holland's *pro se* motion to remove Collins. J.A. 35.

On June 17, 2004, Holland filed another *pro se* motion in the Florida Supreme Court seeking to get free of Collins by requesting a hearing pursuant to the Florida procedure for seeking either substitute counsel or invoking the right to proceed *pro se*. J.A. 149-163.[13] After ordering and receiving responses to this motion from Collins and the State,[14] the

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[12] The Clerk also advised Holland that in lieu of sending money he could contact his attorney for copies or visit the Court's webpage. J.A. 36.

[13] Holland asked for a hearing pursuant to *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973), which requires a court to inquire of a defendant and appointed counsel when allegations of attorney incompetency are made and, if warranted, permitting a court to appoint substitute counsel or to allow the defendant to proceed *pro se*. *Nelson*, 274 So.2d at 259. The Florida Supreme Court approved this procedure in *Hardwick v. State*, 521 So.2d 1071, 1074-75 (Fla.), *cert. denied*, 488 U.S. 871 (1988).

Had Holland been allowed to proceed *pro se*, he would have necessarily received notice when the Florida Supreme Court ruled in his case.

[14] In its Response, the State argued that because the Court had struck Holland's previous *pro se* pleadings, it "should do so **again**" because Holland was represented by counsel. J.A. 45 (emphasis added). Collins' response "expresse[d] no preference whatsoever concerning [his] continued representation of Mr. Holland. . . ." J.A. 41. Collins also wrote that he "communicated" with Holland "before, during and after" the postconviction

(Continued on following page)

Florida Supreme Court **again** denied Holland's motion on October 22, 2004. J.A. 46.

**b. "Please file my 28 U.S.C. 2254 writ of habeas corpus petition before my deadline to file it runs out (expires)."**

Oral argument on the appeal of the denial of postconviction relief and on the state habeas petition was conducted in the Florida Supreme Court on February 10, 2005. On March 3, 2005, Holland wrote Collins:

> I write this letter to ask that you please write me back, as soon as possible, to let me know what the status of my case is on appeal to the Supreme Court of Florida.
>
> If the Florida Supreme Court denies my 3.850-3.851 and State Habeas Corpus appeals, ***please file my 28 U.S.C. 2254 writ of habeas corpus petition, before my deadline to file it runs out (expires).***
>
> Thank you very much.

---

motion was filed, "before, during and after" the evidentiary hearing, and "prior to filing appellate briefs and habeas corpus pleadings on the claims which, in [his] professional judgment, may be advanced in good faith." J.A. 38. In a *pro se* reply to Collins' filing, Holland wrote that Collins did not send him copies of the State's Answer Brief or its Response to the State Habeas Corpus Petition. J.A. 168.

J.A. 210 (emphasis added). *Collins did not respond.* Holland wrote again on June 15, 2005:

> On March 3, 2005, I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.
>
> ***Also, have you begun preparing my 28 U.S.C. §2254 Writ of Habeas Corpus Petition? Please let me know, as soon as possible.***
>
> Thank you.

J.A. 212 (emphasis added). *This letter, too, went unanswered by Collins.*

With no response from Collins, Holland contacted the Florida Supreme Court Clerk in October, 2005, to inquire about how one could access its online docket. J.A. 104.[15] The Clerk supplied Holland with a print-out of its webpage with directions on how one could locate briefs and petitions online. DE38 at 52-54. Holland requested this information "so that he could secure the assistance of outside supporters to keep him updated about the appeal." J.A. 104.

On November 10, 2005, the Florida Supreme Court issued its decision affirming the denial of

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[15] As mentioned above, the Clerk's May 5, 2004, letter to Holland requesting $77.00 for documents referred him to the Court's webpage. J.A. 36. However, as also noted above, death row inmates at UCI do not have online access.

postconviction relief and denying Holland's petition for habeas corpus. *Holland v. State*, 916 So.2d 750 (Fla. 2005). Collins filed no motion for rehearing, and the Florida Supreme Court issued its mandate on December 1, 2005. "Unaware of the state supreme court's decision," J.A. 105, Holland contacted the Clerk's office again by letter of December 21, 2005, to ask when the mandate from his direct appeal had issued. DE35 at 19. The Clerk responded "Re: ALBERT HOLLAND V. STATE OF FLORIDA, CASE NO. SC03-1033" (the case number of the *post-conviction* appeal), without mentioning that relief had been denied in SC03-1033, and advised Holland that the mandate from the direct appeal could be obtained at the Florida State Archives. J.A. 70.[16] Remaining in the dark about the denial of the postconviction appeal, Holland again wrote to Collins on January 9, 2006, requesting, once more, information about his case and re-emphasizing his desire for federal habeas review:

> I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. Have my appeals been decided yet?
>
> Please send me the date when the "mandate" was issued in my case. If you could, please also send me a copy of said "mandate," so that I can determine when the

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[16] Holland followed through and contacted the Archives, which provided him with a copy of the direct appeal mandate. J.A. 71-75.

> deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable "Antiterrorism and Effective Death Penalty Act," ***if my appeals before the Supreme Court of Florida are denied.***
>
> ***Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.***
>
> Mr. Collins, would you please also inform me as to which United States District Court my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition will have to be timely filed in and that court's address?
>
> Thank you very much.

J.A. 214 (emphasis added).[17]

## B. The Federal Court Proceedings.

### 1. Holland's Discovery of the State Court's Decision and Mandate; His Immediate *Pro Se* Habeas Filing.

This was the status of this case when Holland, on January 18, 2006, learned for the first time in the prison writ room that the Florida Supreme Court had

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[17] On this same date – January 9, 2009 – Holland requested to visit the writ room, but his request was inexplicably "refused." DE38 at 62; DE52 at 4-5.

denied relief on November 10, 2005, and had issued its mandate on December 1, 2005.

That instant, Holland hand-wrote a *pro se* habeas petition, which he mailed to the federal court the next day, January 19, 2006. J.A. 181-191.[18] At the top of his *pro se* pleading, Holland wrote "Re: To Preserve Federal Review of State Convictions and Sentences," and, in the opening paragraph, stated that his court-appointed counsel "failed to undertake timely action" in seeking habeas relief. J.A. 181. Holland summarily listed the claims that had been raised on direct appeal, in his postconviction appeal, and in his state habeas petition. J.A. 181-190. He also listed the claims contained in the *pro se* filings he had submitted but which the state courts had stricken. J.A. 190-191. He requested the appointment of counsel and "a reasonable amount of time to amend his action." J.A. 191.

**2. Collins' Betrayal.**

Holland was allowed to make an emergency telephone call to Collins on January 19, 2006. J.A. 76. Coincidentally, that same day Holland received a letter from Collins asking Holland to fill out, sign, and return an indigency affidavit to accompany a

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[18] The Eleventh Circuit recognizes the "mailbox rule" for filing a prisoner's habeas petition. *Adams v. United States*, 173 F.3d 1339 (11th Cir. 1999). The court below and the State agree that Holland's *pro se* habeas petition was filed on January 19, 2006. J.A. 107; BIO 8-9.

petition for certiorari to this Court from the denial by the Florida Supreme Court. J.A. 216. Holland wrote to Collins on January 20, 2006, indicated that he had filled out the indigency form, and said:

> Since recently, the Supreme Court of Florida has denied my 3.851 and state writ of habeas corpus petition, I am left to understand that you are planning to seek certiorari on these matters.
>
> It's my understanding that the AEDPA time limitations is not *tolled* during *discretionary* appellate reviews, such as certiorari applications resulting from denial of state post conviction proceedings.
>
> Therefore, I advise you *not* to file certiorari if doing so affects or jeopardizes my one year *grace* period as prescribed by the AEDPA.

*Id.* (emphasis in original).[19]

On January 26, 2006, Holland attempted to place a telephone call to Collins, but Collins' office refused to accept the call. J.A. 218. The next day, Holland again wrote to Collins about "the present status of my case on appeal. What have you filed? Please send me a copy of what you have filed on my behalf. I've

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[19] On February 8, 2006, Collins filed a certiorari petition, which was denied on April 17, 2006. *Holland v. Florida*, 547 U.S. 1078 (2006).

written you two letters but you have not responded to them. Please respond." J.A. 218.

On January 31, 2006, Collins wrote to Holland explaining, for the first time (and falsely), that Holland's four years of vigilance had been a fool's errand all along because the AEDPA statute of limitations had expired *before* Collins was even *appointed* to the case:

> I am in receipt of your letter dated January 20, 2006 concerning operation of AEDPA time limitations. One hurdle in our upcoming efforts at obtaining federal habeas corpus relief will be that *the one-year statutory time frame for filing such a petition began to run after the case was affirmed on October 5, 2000*. . . . However it was not until November 7, 2001, that I received the Order appointing me to the case. As you can see, *I was appointed about a year after the case became final. . . . [The AEDPA statute of limitations period] had run before my appointment and therefore before your Rule 3.850 motion was filed.*

J.A. 78-79 (emphasis added).

On February 9, 2006, Holland responded to Collins' letter and said that Collins was "incorrect" that the one-year period began to run on October 5, 2000. J.A. 222. Holland pointed out that certiorari was denied on October 1, 2001, and "that is when my case became final." *Id.* Holland's letter continued:

Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U.S.C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred.

*You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005, decision denying my post-conviction appeals. You never kept me informed about the status of my case, although you told me that you would immediately inform me of the court's decision as soon as you heard anything.*

Mr. Collins, I filed a motion on January 19, 2006, to preserve my rights, because I did not want to be time-barred. Have you heard anything about the aforesaid motion? Do you know what the status of aforesaid motion is?

Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting any more time (valuable time).

Again, please file my 2254 Petition at once.

*Your letter is the first time that you have ever mentioned anything to me about my time had run out, before you were appointed to represent me*, and that my one-year started to run on October 5, 2000.

> Please find out the status of my motion that I filed on January 19, 2006 and let me know.

J.A. 222-223 (emphasis added).[20]

### 3. Holland's Request for Counsel and the State's Motion to Dismiss.

On March 8, 2006, Holland mailed a *pro se* "Emergency Motion to Dismiss Conflict-Counsel and for Appointment of Conflict-Free Counsel" to the district court requesting that Collins be dismissed and new counsel appointed, or that he be allowed to proceed *pro se*. J.A. 192-196. Holland alleged that Collins had not communicated with him from July, 2005, until January 19, 2006, that the prison "limits the hours that petitioner may have access to the law

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[20] On March 1, 2006, Holland mailed another complaint to the Florida Bar. DE41-1 at 8. In his grievance, Holland wrote that Collins "failed to inform me that the Florida Supreme Court denied my 3.850-3.851 and state habeas corpus appeals on November 10, 2005" and that Collins "failed to file my 28 U.S.C. §2254 habeas corpus petition in federal court before the deadline ran out (expired)." *Id*. This time the Florida Bar requested a response from Collins, which he submitted by letter dated March 21, 2006. DE41-1 at 2-3. In that response, Collins' attorney wrote that "[a]ll orders and motions have been forwarded to Mr. Holland"; that a petition for writ of certiorari was pending in this Court; and that "Mr. Collins has written Mr. Holland regarding some time limitation I believe may apply to him regarding federal attacks, and he is still researching filings in federal court," and that a "detailed explanation was written and sent to Mr. Holland." DE41-1 at 3.

library and the law materials contained there are very limited," that Collins failed to inform him of the Florida Supreme Court's denial, and that Holland had "instructed [Collins] to file his 2254 Habeas Petition, before the deadline to file it ran out (expired), but he refused to file the petition." J.A. 193-196. Holland also wrote that Collins had committed "egregious errors" and "deceived and misled petitioner as to when he would file his 2254 petition and has also misrepresented the law and facts, through-out said representation of petitioner's case." J.A. 194-195.

On March 22, 2006, Collins mailed Holland a proposed federal habeas petition requesting that Holland either sign and return the petition so that Collins could file it and continue his representation, or that Holland request that Collins move to withdraw. DE20 at 18.[21]

On March 27, 2006, the State responded to Holland's *pro se* motion for appointment of counsel and moved to dismiss Holland's *pro se* habeas petition. DE8. With respect to the petition, the State **once more** argued that Holland's *pro se* habeas petition was a "nullity" and should be dismissed because "Holland may not maintain a *pro se* Petition for Writ of Habeas Corpus while he has a Petition for Writ of Certiorari pending in the United States Supreme

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[21] This letter to Holland was written one day after Collins' attorney responded to Holland's complaint to the Florida Bar. *See supra* note 20

Court." DE8 at 2. Moreover, the State contended that Holland "does not have the right to proceed pro se while he is simultaneously being represented by a lawyer" and thus Holland's *pro se* habeas petition should be dismissed because he filed it while being represented by Collins. DE8 at 4. With respect to the counsel issue, the State argued that Collins had been appointed pursuant to Florida's registry scheme which required him to continue in his representation until Holland's sentence was reversed, reduced, or carried out, or until a state court permitted him to withdraw. DE8 at 4-5.[22]

The district court entered two Orders to Show Cause on March 29, 2006. DE9, 10. One directed the State to respond to Holland's *pro se* habeas corpus petition with "particular attention" to the timeliness of the petition, DE9; the other ordered Collins to respond to Holland's *pro se* motion to dismiss Collins. DE10. The district court was "particularly concerned over the source of the alleged conflict between counsel and Petitioner" and directed Collins to "address whether his appointment by the State of Florida extends to his representation of Petitioner in the instant federal habeas case." DE10.

On April 28, 2006, the State filed its Answer in response to the Show Cause Order. DE14. The State argued that Holland's *pro se* habeas petition was filed

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[22] The State did not serve this pleading on Holland himself. Only Collins was served. DE8 at 6.

38 days beyond the statutory deadline set forth in 28 U.S.C. §2244(d)(1). DE14 at 12-13. According to the State, Holland's one year began running October 1, 2001, and was tolled on September 19, 2002, 11 months and 19 days later. DE14 at 13.[23] The time was tolled until the December 1, 2005, mandate from the Florida Supreme Court, at which time the clock began to run again. *Id.* In the State's view, Holland had 11 days after the issuance of the mandate, or until December 12, 2005, in which to file his federal habeas petition. DE14 at 14. Because he did not file his *pro se* petition until January 19, 2006, it was time-barred. *Id.*

Collins filed a response to the Order to Show Cause but did not respond to Holland's allegations. DE16. He did not mention whether the AEDPA's statute of limitations had expired on his watch. He did not deny that Holland had asked him repeatedly to file his federal habeas petition in a timely manner, that he had promised to do so, and that he had deceived and misled Holland. He did not explain why he failed to tell Holland about the Florida Supreme Court's denial or the issuance of its mandate.[24]

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[23] As noted earlier, Holland's state postconviction motion was actually filed on September 17, 2002, not September 19.

[24] The show cause order specifically had directed Collins to "respond with a written memorandum addressing Petitioner's emergency motion." DE10.

Instead, Collins described the procedural history of Holland's case and his own efforts leading up to the filing of Holland's postconviction motion on September 17, 2002. DE16 at 4-6. Collins wrote that he had "completed" a federal habeas corpus petition, had mailed Holland a copy, and had asked Holland whether he wanted Collins to file the petition or seek in state court to withdraw from the case.[25] DE16 at 6. Collins wrote that he had filed a motion in state court to withdraw as Holland's counsel because Holland "failed to elect" either of the alternatives. *Id.* Collins ultimately obtained an order from state court permitting him to withdraw from Holland's representation and Collins so informed the federal district court on May 5, 2006. DE17.

On May 25, 2006, the district court denied as moot Holland's *pro se* motion to discharge Collins because the state court had appointed the Office of the Capital Collateral Regional Counsel-South (CCRC-South) to undertake Holland's representation. DE18. CCRC-South, however, moved the district court to appoint other counsel because its office had a burdensome case load. DE19.[26]

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[25] Collins' response failed to note he did not mail Holland a proposed petition until March 22, 2006, well after Holland filed his *pro se* petition and well after the statutory deadline had expired.

[26] This was the second time CCRC-South had been appointed to Holland's case. CCRC-South is a state-funded agency providing legal representation to indigent death-row inmates for

(Continued on following page)

With the status of counsel still up in the air, Holland filed a *pro se* "rebuttal" to Collins' response to the court. J.A. 197-204. Holland correctly noted that Collins had not explained in his response to the court's show cause order why he had: (1) failed to inform Holland of the Florida Supreme Court's denial of relief in November, 2005; (2) failed to timely file his federal habeas petition despite Holland's repeated instructions to do so; (3) always led Holland to believe Collins would file a federal habeas petition in a timely manner; (4) deceived and misled Holland as to when Collins would file a federal habeas petition; and (5) drafted a federal habeas petition "two months and three days after petitioner filed a 'pro se' writ of habeas corpus petition on January 19, 2006," a draft which was "basically identical" to what Holland had filed *pro se* except that Collins' draft was typed. J.A. 198.

On June 13, 2006, the federal court relieved CCRC-South from its representation of Holland and appointed Todd Scher. DE22.

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state and federal postconviction litigation, Fla. Stat. §§27.701-708, and was originally appointed by the Florida Supreme Court to represent Holland on October 1, 2001. DE38 at 9. CCRC-South had to withdraw then due to its excessive case load; Collins was on the list of "registry" attorneys, *see supra* note 3, and was appointed to represent Holland after CCRC-South withdrew. DE16 at 3.

### 4. Holland Asserts Entitlement to Equitable Tolling.

On November 21, 2006, Holland's new counsel responded to the State's statute of limitations defense, DE35, and submitted an appendix of documents in support of an evidentiary hearing and of Holland's entitlement to equitable tolling. J.A. 53-81; 205-223; DE38.[27] Holland argued that he could establish "extraordinary circumstances that [were] both beyond his control and unavoidable even with diligence." DE35 at 8. Holland pled that he "sought assurances from Mr. Collins that his deadlines, both state and federal, would be honored." DE35 at 11. He detailed the chronology of events, including his instructions to Collins to file his federal habeas petition before the statutory deadline and Collins' assurances that he was "aware of" the relevant time

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[27] The Appendix submitted in the district court, DE38, included the Florida Supreme Court's docket sheets from Holland's cases on direct appeal, from the denial of the appeal from denial of postconviction relief, and from the denial of the petition for habeas corpus. DE38 at 4-9; 31-35; 37-39. It also contained other documents and letters, some of which are reproduced in the Joint Appendix. The docket sheets documented filings in the Florida Supreme Court with brief explanatory notes entered by the Clerk; not all of the actual filings in the Florida Supreme Court, and documented on the docket sheets, were filed with the Appendix in the district court. However, the district court, the Eleventh Circuit, and the parties relied upon these docket sheets and the explanatory notes they contained. The parties agreed to include in the Joint Appendix many of the actual documents filed in the Florida Supreme Court reflected in the docket sheets.

limitations and exhaustion requirements. DE35 at 11, 16-17, 20-21. Holland also pled that Collins asked him to have "confidence" in Collins' work and his word. DE35 at 13. Holland explained the various *pro se* filings in the state courts seeking to have his issues heard and to have Collins removed, and that his efforts had been rebuffed by the Florida courts' granting the State's motions to strike his *pro se* pleadings as "nullities" that were "unauthorized." DE35 at 13-16. Holland also set out his repeated letters to the Florida Supreme Court Clerk requesting status updates and information about how to obtain copies of briefs and other pleadings that Collins had failed to provide him. DE35 at 18. He pled that in order to obtain pleadings and briefs from the Florida Supreme Court, he would have had to send money. DE35 at 15. Holland also documented that Collins never, either by letter or phone call, informed him of the Florida Supreme Court's denial of relief in November, 2005, or of the issuance of its December 1 mandate. DE35 at 18-19; J.A. 105. *See also* BIO 13 ("Collins did fail to notify Holland that the mandate had issued").

On January 29, 2007, the State responded to Holland's pleading, again maintaining that his *pro se* habeas corpus petition was a "nullity when filed" because Holland filed it *pro se* while represented by Collins. DE41 at 2 & n.3. The State did not dispute that equitable tolling was available but contended that Holland had the burden of establishing (1) that he had been pursuing his rights diligently, and

(2) that some extraordinary circumstance stood in his way. DE41 at 5.

The State argued that Holland lacked diligence because the Florida Supreme Court Clerk never "misled" Holland by promising to notify him when his case was decided and that Holland "could have" easily requested that the Court provide him with a copy of its opinion and mandate. DE41 at 8, 9.[28] The State also contended that Holland failed to "report what efforts, if any" he had made to secure assistance from persons outside the prison after he obtained information about the Florida Supreme Court's online docketing system. DE41 at 9. Finally, the State argued that attorney negligence did not entitle Holland to equitable tolling and that Collins "did not ignore Holland's requests and even prepared a federal habeas petition." DE41 at 9-10, 12.

### 5. The District Court Dismissed Holland's Habeas Corpus Petition as Untimely.

On April 27, 2007, the federal district court, without holding an evidentiary hearing, dismissed Holland's *pro se* habeas corpus petition as untimely. J.A. 81-94. The court concluded that Holland lacked diligence because the Florida Supreme Court Clerk never promised to inform him of the outcome of his case and Holland did not request that the Clerk send

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[28] The State did not explain where Holland would get the funds to pay for a copy of an opinion.

him a copy of its decision or mandate. J.A. 87. The court also found diligence lacking because Holland failed to discuss what efforts he made to "find" outside supporters once he received information about the Florida Supreme Court's online docket. J.A. 88. The court wrote that Collins met with Holland on death row, communicated with him "on several occasions," provided a "detailed, written explanation of the strategy for the case," pursued collateral relief in the state courts, and filed a petition for writ of certiorari following the denial by the Florida Supreme Court. J.A. 90-91. The court wrote that Collins prepared a "proposed" federal habeas petition for Holland's review and signature, but Holland "never responded" to Collins. J.A. 91.

The court accepted the State's argument that Holland had no right to file *pro se* pleadings in the state courts (or, by implication, to be "served" with the Florida Supreme Court's decision) while simultaneously being represented by Collins. *Id.* Later, ruling on Holland's motion to alter or amend the judgment of dismissal, the district court found that "[w]hether waiting approximately seven weeks to inform Petitioner, when counsel believed, although erroneously, that the filing deadline had already passed, rises to an extraordinary circumstance is debatable." J.A. 99-100.

### 6. The Eleventh Circuit's Flawed, Bright-Line Test for Equitable Tolling.

The Eleventh Circuit described equitable tolling as an "extraordinary remedy" to be "applied sparingly." J.A. 107. It agreed that Holland's federal habeas petition would be considered timely if he showed (1) that he had pursued his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. J.A. 107-108 (quoting *Lawrence v. Florida*, 549 U.S. 327 (2007)). It wrote that "attorney negligence is not a basis for equitable tolling," J.A. 108, but noted that, in *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008), the Circuit had recently addressed whether attorney misconduct "going beyond 'mere negligence' may constitute an extraordinary circumstance warranting equitable tolling." J.A. 109. The *Holland* court explained that, in *Downs*, a district court order dismissing a habeas petition as untimely had been vacated because counsel's misconduct in missing the AEDPA deadline included "affirmative misrepresentations by counsel" about the filing of a state court postconviction motion that would have tolled the statute of limitations. In contrast to *Downs*, the *Holland* court wrote that here there was "no allegation of knowing or reckless misrepresentation or of lawyer dishonesty." J.A. 110.[29]

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[29] In point of fact, Holland specifically pled that Collins had "deceived and misled" him as to when he would file his habeas petition. J.A. 194-195.

The court described the allegations here as merely "Collins's failure to communicate with Petitioner on the status of his case and [ ] Collins's failure to file a federal habeas petition timely, despite repeated instructions to do so." J.A. 110. Assuming that Collins was "grossly negligent" in his representation of Holland, the Eleventh Circuit categorically excluded his "gross negligence" from its newly-announced bright-line rule for equitable tolling:

> We will assume that Collins's alleged conduct is negligent, even grossly negligent. *But in our view,* ***no*** *allegation of lawyer negligence or of failure to meet a lawyer's standard of care – in the absence of an allegation of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part – can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling.*

J.A. 110 (emphasis added).

The court concluded that Holland presented no evidence that "he ever asked – before the limitations period for filing his federal habeas petition had run – that the Florida Supreme Court provide him directly with notice of the decision on his postconviction appeal," and that Holland's inquiry of the Florida Supreme Court on December 21, 2005, was 9 days after the deadline had passed. J.A. 111. The court found that the Department of Corrections' denial of Holland's access to the prison writ room on January 9, 2006, was also well beyond the limitations period

and, thus, Holland "cannot reasonably argue that the incidents to which he draws our attention – both occurring after the limitations period had run – prevented him from filing a federal habeas petition timely." *Id.*[30]

## SUMMARY OF ARGUMENT

By every precept of equity, petitioner is entitled to equitable tolling. The relevant statute, 28 U.S.C. §2244(d)(1), is a classic statute of limitations, which Congress would expect to be read in light of the conventional presumption that such limitations are subject to tolling in extraordinary circumstances. This Court has declared the presumption to be "hornbook law" and has recognized it in a wide range of contexts; the Court has several times assumed that §2244(d)(1) is susceptible to equitable tolling; every circuit court of appeals that has decided the question (eleven, in all) has agreed.

*Pace v. DiGuglielmo*, 544 U.S. 408 (2005), identified the traditional equitable tolling inquiries and applied them to §2244(d)(1): "Generally, a litigant seeking equitable tolling bears the burden of

[30] The Eleventh Circuit misconstrued Holland's arguments on these matters. Holland did not argue that his December 21, 2005, letter to the Florida Supreme Court or the denial of access to the writ room on January 9, 2006, constituted "extraordinary circumstances." Rather, these facts showed Holland's diligence.

establishing . . . (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Such a standard provides adequate guidance to the lower courts while allowing the adaptability for case-specific considerations that is the time-honored signature of equity. The lower courts have widely adopted it and applied it with discretion. They have reserved tolling for the rare, exceptional cases in which some unpredictable situation beyond a prisoner's control has resulted in delayed filing despite his or her diligence.

This is such a case. Throughout his state postconviction proceedings, petitioner repeatedly informed his court-appointed attorney, the State, and the Florida courts of his desperate desire to preserve his claims for federal habeas review. He implored his attorney to meet filing deadlines and made ceaseless inquiries about the status of his case. His attorney assured him the deadlines would be met. When the attorney failed to keep him advised of the status of his case, petitioner repeatedly tendered *pro se* filings and made inquiries of the court clerk. He sought to have his attorney removed by motions to the court and complaints to the Florida Bar. His six *pro se* pleadings were stricken as "nullities" at the State's insistence, on the ground that he was represented by counsel and could not address the courts personally. His motions to discharge counsel were rebuffed, with the result that, when the Florida Supreme Court denied him postconviction relief, notice was sent to his lawyer rather than petitioner himself. The lawyer

failed to advise him either of the Florida Supreme Court's decision or of its issuance of mandate which recommenced the federal clock running.

Petitioner had begged his attorney: "Please file my 28 U.S.C. 2254 writ of habeas corpus petition before my deadline to file it runs out (expires)." The attorney had assured petitioner he would do so and had asked for petitioner's "trust" and "confidence." But the attorney let petitioner's federal deadline pass without filing a federal petition or even informing petitioner that the state postconviction proceedings had been decided and that the federal clock was ticking. When petitioner first learned these things – on his own, through the prison's writ room – he hand-wrote a federal habeas petition and filed it himself within 24 hours. One month too late.

Petitioner could not reasonably have done more than he did to assure the timely filing of his federal petition. The State of Florida could not possibly have done more than it did to prevent him from safe-guarding his own rights or to turn his status as a "represented" litigant into a state of helpless dependence on his court-appointed lawyer. That lawyer solicited Holland's trust and betrayed it. The Florida courts and Bar watched this happen and did nothing, despite Holland's pleas to them for aid.

Such circumstances are extraordinary. In a civilized administration of justice, they must be. Equity must recognize that.

## ARGUMENT

### A. Equitable Tolling Is Available Under the AEDPA.

The doctrine of equitable tolling permits a court to toll a statute of limitations when extraordinary circumstances make rigid application of the statute unfair. When Congress provides for court filing deadlines its intent may be either to provide for the orderly processing of claims or to place a limit on a federal court's jurisdiction to entertain a claim. *Bowles v. Russell*, 551 U.S. 205, 211 (2007). Legislation containing a limitation period (governing the way claims are processed) customarily allows for equitable tolling;[31] a jurisdictional requirement customarily does not. *Id.*[32]

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[31] It is "hornbook law that limitations periods are 'customarily subject to equitable tolling.'" *Young v. United States*, 535 U.S. 43, 49 (2002), quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). *See also Bowen v. City of New York*, 476 U.S. 467, 479-80 (1986); *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982); *Amer. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-58 (1974); *Honda v. Clark*, 386 U.S. 484, 501 (1967).

[32] The Court emphasized in *Bowles* that the jurisdictional requirement in that case was established by statute rather than by rule or by judicial decision. Of course, Congress typically exercises its constitutional authority regarding the federal courts' jurisdiction by means of statutes. Yet a time limit is not jurisdictional *because* it is in a statute. Hosts of nonjurisdictional "statutes of limitations" are statutory.

28 U.S.C. §2244(d)(1) announces its character with unmistakable clarity: a "*period of limitation* shall apply to an application for a writ of habeas corpus." (emphasis added). This Court has recognized that §2244(d)(1) creates a "statute of limitations" rather than a jurisdictional requirement, *Day v. McDonough*, 547 U.S. 198, 205 (2006),[33] and has assumed without deciding that equitable tolling applies to §2254(d)(1). *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005).[34]

Eleven circuits have held that the limitation period in §2244(d)(1), or the similar period in 28 U.S.C. §2255(f), allows for equitable tolling.[35] This

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[33] *Accord Day*, 547 U.S. at 213 (Scalia, J., dissenting, joined by Thomas & Breyer, JJ.) (explaining that "the enactment of time-limitation periods such as that in §2244(d), without further elaboration, produces defenses that are nonjurisdictional"); *see also Calderon v. Ashmus*, 523 U.S. 740, 747-748 (1998) (describing the time limits in §2244(d)(1) and in 28 U.S.C. §2263 as "statute[s] of limitations" giving rise to a "defense").

[34] Members of the Court have expressed the view that the §2244(d)(1) period of limitation can be equitably tolled. *See Duncan v. Walker*, 533 U.S. 167, 184 (2001) (Stevens, J., concurring in part and concurring in the judgment, joined by Souter, J.); *id.* at 192 (Breyer, J., dissenting, joined by Ginsburg, J.); *Pliler v. Ford*, 542 U.S. 225, 235 (2004) (O'Connor, J., concurring).

[35] *See Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997), *overruled on other grd's*, 163 F.3d 530 (9th Cir. 1998) (*en banc*) ("Every relevant signal – from the Act's plain language, to its legislative history, to its structure – points in the same direction: [the] one-year timing provision is a statute of

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chorus of agreement is unsurprising given the history and purpose of habeas corpus. Congress "must be presumed to draft limitations periods" in view of the "background principle" that equitable tolling is "customarily" available, *Young*, 535 U.S. at 49, especially when federal courts are required to apply "the principles and rules of equity jurisprudence." *Id.* at 50. Habeas corpus is governed by equitable principles. *Gomez v. United States District Court*, 503 U.S. 653, 653-654 (1992); *cf.* 28 U.S.C. §2243 (a court entertaining a habeas petition "shall . . . dispose of the matter as law and *justice* require") (emphasis added).[36] Consistent with equity principles, Congress

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limitations subject to equitable tolling, not a jurisdictional bar."); *see also Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Miller v. New Jersey Dep't of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 329-340 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *McClendon v. Sherman*, 329 F.3d 490, 492 (6th Cir. 2003); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Sandvik v. United States*, 177 F.3d 1269, 1270 (11th Cir. 1999); H.R. Conf. Rep. No. 104-518, at 111 (1996), 1996 U.S. Code & Admin. News 924 (stating that the AEDPA "sets a one year statute of limitation on an application for a habeas writ"); *Calderon, supra*, at 1288 (collecting statements by the floor leaders explaining that the bill would establish a "statute of limitations"). The question is open in the D.C. Circuit. *United States v. Pollard*, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005).

[36] *See also Lonchar v. Thomas*, 517 U.S. 314, 323 (1995); *Withrow v. Williams*, 507 U.S. 680, 716-17 (1993) (Scalia, J.,

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chose to create a limitation period, not anticipating all the scenarios in which tolling may serve equity, but instead relying on courts to exercise case-by-case judgment. *Schlup v. Delo*, 513 U.S. 298, 319 n.35 (1995) ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence"); *Moore v. Sims*, 442 U.S. 415, 433 (1979) ("extraordinary circumstances" can be identified only on a case-by-case basis). Congress plainly intended for equitable tolling to be available under the AEDPA.[37]

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concurring in part and dissenting in part, joined by Thomas, J.) (confirming the writ's equitable heritage).

[37] This Court resists interpretations of habeas statutes "that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (quoting *Castro v. United States*, 540 U.S. 375, 380-81 (2005). *See also Danforth v. Minnesota*, 552 U.S. 264, ___, 128 S.Ct 1029, 1040 (2008) ("This Court has interpreted . . . the statute's command to dispose of habeas petitions 'as law and justice require,' 28 U.S.C. §2243 . . . as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations."); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power. . . .").

## B. Equitable Tolling Is Based Upon General Principles Which Allow Fact-Dependent and Case-Specific Inquiries; This Court, and Circuit Courts Nationwide, Apply Such General Principles; the Lower Court Did Not.

### 1. The History of Equitable Tolling Generally and in Habeas – Flexibility.

Habeas corpus is "'governed by equitable principles.'" *Munaf v. Geren*, 128 S.Ct. 2207, 2220 (2008) (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963); *see also Schlup*, 513 U.S. at 319 ("Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy."). Courts in equity cases "tailor relief, and related procedure, to the exigencies of particular cases and individual circumstances," *Miller v. French*, 530 U.S. 327 (2000) (Breyer, J., joined by Stevens, J., dissenting), and are not "controlled by rigid rules rigidly adhered to." *Di Giovanni v. Camden Fire Ins. Ass'n.*, 296 U.S. 64, 70 (1935). Equitable principles make adjustments for exceptional, unpredictable, circumstances that may come from any source and out of the blue, circumstances in which the application of rigid rules could result in an injustice. *Califano v. Yamasaki*, 442 U.S. 682 (1979); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942). The whole history of equity jurisprudence makes plain that bright-line rules disserve this vital function: "[e]quity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *see also Hecht Co. v. Bowles*, 321

U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the equity of the case.").

This paradigm of flexibility resonates with the tradition of equitable tolling.[38] And it is workable, as evidenced by its adoption across virtually the entire roster of federal proceedings and claims.[39]

AEDPA's time limitation is no exception to this body of federal equitable tolling jurisprudence. The circuit courts have uniformly recognized that equitable tolling is available under the AEDPA but is appropriate only in rare conjunctions of highly singular circumstances. Far from prescribing any pat formula, the circuit courts have maintained flexibility by examining on a case-by-case basis whether extraordinary circumstances beyond a petitioner's control caused him or her to miss the statutory filing deadline, despite the petitioner's diligence. The following cases are illustrative of this case-specific,

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[38] "Justice sets out rigid rules and can be qualified by equity. Equity is not rigid: it is, as Aristotle said, malleable like lead and can be adjusted to special circumstances." D.D. Raphael, *Concepts of Justice*, 237 (Oxford University Press 2001).

[39] Appendix A hereto is a compendium of federal cases documenting the application of equitable tolling to forty-five (45) different federal statutes or claims, from the Age Discrimination in Employment Act to Wrongful Death Actions.

flexible approach to the rarely-employed remedy of equitable tolling under the AEDPA:

> 1st Circuit: *Barreto-Barreto v. United States*, 551 F.3d 95, 100-101 (1st Cir. 2008) (to warrant equitable tolling petitioners must demonstrate extraordinary circumstances beyond their control; tolling is not applicable if petitioners "simply 'failed to exercise due diligence in preserving [their] legal rights.'")
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> 2d Circuit: *Doe v. Menefee*, 391 F.3d 147, 159 (2d Cir. 2004) (equitable tolling is available in "rare and exceptional circumstances"; a petitioner must establish that extraordinary circumstances prevented him from filing on time, and that he acted with reasonable diligence throughout the period he seeks to toll.)
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> 3d Circuit: *Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003) (equitable tolling is available only when the principle of equity would make the rigid application of a limitation period unfair; equitable tolling excuses untimely filing when the petitioner has in some extraordinary way been prevented from asserting his or her rights and the petitioner has shown that he or she exercised reasonable diligence.)
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> 4th Circuit: *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (*en banc*) (equitable tolling is appropriate only when a petitioner shows (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented timely filing; "Principles of

equitable tolling do not extend to garden variety claims of excusable neglect.")

5th Circuit: *Hardy v. Quarterman*, 577 F.3d 596, 598-600 (5th Cir. 2009) (long delay in receiving notice of state court action may warrant equitable tolling but a petitioner must proceed with diligence and alacrity both before and after receiving notification of the denial of his state court petition.)

6th Circuit: *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (equitable tolling is allowed when "a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control"; factors are (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement; these factors "are not necessarily comprehensive or always relevant; ultimately every court must consider an equitable tolling claim on a case-by-case basis.")

7th Circuit: *Jones v. Hulick*, 449 F.3d 784, 789 (7th Cir. 2006) (equitable tolling excuses an untimely filing when, despite exercising reasonable diligence, a petitioner could not have learned the information he needed in order to file on time.)

8th Circuit: *Streu v. Dormire*, 557 F.3d 960, 967 (8th Cir. 2009) (litigant seeking

equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.)

9th Circuit: *Ramirez v. Yates*, 571 F.3d 993, 997-998 (9th Cir. 2009) (for equitable tolling petitioner must establish that he has been pursuing his rights diligently and that some extraordinary circumstances stood in his way; a prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter.)

10th Circuit: *Laurison v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007) (AEDPA one-year statute of limitations is not jurisdictional and can be equitably tolled, but equitable tolling is limited to "rare and exceptional circumstances.")

11th Circuit: *Downs v. McNeil*, 520 F.3d 1311, 1318-1319, 1322 (11th Cir. 2008) (equitable tolling is limited to extreme cases where failure to invoke principles of equity would lead to unacceptably unjust outcomes; it is warranted in extraordinary circumstances that are both beyond petitioner's control and unavoidable even with diligence, a fact-specific, case-by-case inquiry.)

D.C. Circuit: *United States v. Saro*, 252 F.3d 449, 454-455 (D.C. Cir. 2001) (if equitable tolling applies to 2255 motions, tolling is

warranted only when extraordinary circumstances beyond a prisoner's control prevented him from filing by the deadline.)

### 2. The Court Below Created a Rigid Categorical Rule That Is Antithetical to the Equitable Tradition.

Contrary to the equitable tradition of "eschew[ing] mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. at 396, the court below introduced a rigid, bright-line rule into the equitable-tolling determination. Such an abrogation of equity conflicts with this Court's precedents and is anomalous when compared to other circuit court decisions, including other decisions of the Eleventh Circuit.[40]

Specifically, the court below, after "assum[ing] that Collins's alleged conduct is negligent, even grossly negligent," announced "[b]ut in our view, no allegation of lawyer negligence or of failure to meet a lawyer's standard of care – in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part – can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling." J.A. 110. It justified this hidebound rule by explaining that "We recall the maxim that '[e]very exception not watched, tends to take the place of the rule.' . . . We are attempting to keep the exception for

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[40] *See, e.g., Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008).

extraordinary circumstances from being the rule." *Id.* n.10.[41]

In Holland's case, a perfect storm of circumstances resulted in the AEDPA statute of limitations not being met. These extraordinary circumstances, considered with Holland's diligence throughout, ought to result in equitable tolling. *See* section C, *infra*. Postconviction counsel's actions contributed in important and extraordinary ways to this perfect storm, but the application of the Eleventh Circuit's ironclad rule – "*no* allegation of lawyer negligence or of failure to meet a lawyer's standard of care" can support a finding of equitable tolling," *not even gross negligence* – ensured that the specific facts and circumstances of Holland's case would not receive meaningful, equitable consideration. There was thus no attempt in the lower court "to do equity and to mould each decree to the equity of the case." *Hecht Co. v. Bowles*, 321 U.S. at 329.

### 3. This Court's Decisions in *Pace* and *Lawrence* Establish a Workable General Rule.

Although equitable principles are not reducible to rigid rules, they are subject to formulations that identify the controlling general considerations

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[41] The Court cited Peloubet, *Legal Maxims*, 294 (1884) (1985 ed.), for this maxim. *Cf. id.* at 24 ("A good judge decides according to justice and right, and prefers equity to strict law.").

sufficiently to guide the lower courts.[42] This Court identified a workable standard for equitable tolling in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and again in *Lawrence v. Florida*, 549 U.S. 327 (2006); and the circuits are adept at applying that standard.

In *Pace*, the Court recognized that "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The Court applied this standard and determined that Pace had not been diligent.[43]

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[42] *See Missouri v. Jenkins*, 515 U.S. 70, 127 (1995) (Thomas, J., concurring) ("courts of equity must be governed by rules and precedents no less than courts of law"); *Lonchar v. Thomas*, 517 U.S. 314 (1995); *see also* Blackstone (I *Blk. Comm.* 62) ("Law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law, which would make every judge a legislator, and introduces most infinite confusion, as there would be almost as many different rules of action laid down in our courts as there are differences of capacity and sentiment in the human mind.").

[43] The Court noted the following:

> [P]etitioner waited years, without any valid justification, to assert these claims in his November 27, 1996, PCRA petition. Had petitioner advanced his claims within a reasonable time of their availability, he would not now be facing any time problem, state or federal. And not only did petitioner sit on his rights for years *before* he filed his PCRA petition, but he also sat on them for five more months *after* his PCRA

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Thereafter, in *Lawrence* this Court again assumed, because the parties did (549 U.S. at 335 n.3), that equitable tolling was available with respect to §2244(d). Going on to suggest that equitable tolling could provide a remedy for harsh results of the statute's application to unique and inappropriate situations,[44] the Court reiterated the *Pace* standard:

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> proceedings became final before deciding to seek relief in federal court. *See id. [App],* at 372, 373. Under long-established principles, petitioner's lack of diligence precludes equity's operation. *See Irwin v. Department of Veterans Affairs, supra*, at 96, 111 S.Ct. 453; *McQuiddy v. Ware*, 20 Wall. 14, 19, 22 L.Ed. 311 (1874) ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights").

*Pace*, 544 U.S. at 419.

[44] The Court in *Lawrence* was called upon to decide whether statutory tolling applied under 28 U.S.C. §2244(d) for the period of time when a petition for certiorari was pending in this Court from the denial of an application for state postconviction review. This Court held that this time was not tolled because the "state application" is not still "pending" after the state courts have entered a final judgment on the matter. *Lawrence*, 549 U.S. at 337. Lawrence argued that this could result in injustices

> . . . when the state court grants relief to a prisoner and the state petitions for certiorari. In that hypothetical, Lawrence maintains that the prisoner would arguably lack standing to file a federal habeas application immediately after the state court's judgment (because the state court granted him relief) but would later be time barred from filing a federal habeas application if we granted certiorari and the State prevailed. Again, this particular procedural posture is extremely rare.

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to warrant equitable tolling, a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence*, 549 U.S. at 336 (quoting *Pace*, 544 U.S. at 418). The Court concluded that Lawrence had not shown extraordinary circumstances.[45]

### C. On the Record Presented, Holland Is Entitled to Equitable Tolling.

Holland does not present a "garden variety claim of excusable neglect," *Irwin*, 498 U.S. at 96, and his case is not about "attorney miscalculation," *Lawrence*, 549 U.S. at 336, or "mere negligence" by counsel. J.A. 108. His case "must be determined by its own particular circumstances," *McQuiddy v. Ware*, 87 U.S. 14, 19 (1873), and there is nothing garden variety,

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*Id.* at 335. This Court responded: "Even so, equitable tolling may be available, in light of the arguably extraordinary circumstances and the prisoner's diligence." *Id.*

[45] Lawrence argued that his counsel's mistake in miscalculating the limitations period entitled him to equitable tolling. But this "would essentially equitably toll limitations periods for every person whose attorney missed a deadline. Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." 549 U.S. at 336-37. Lawrence also suggested equitable tolling ought to apply "because the state courts appointed and supervised his counsel." The Court rejected this argument because "a State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay." *Id.* at 337.

average, or "mere" about the circumstances here. This is a rare case in which a habeas petitioner tried the best anyone could under his circumstances to preserve his right to federal court consideration of a state court judgment, but extraordinary events overtook him. These extraordinary circumstances, and Holland's diligence, included:

> • At the outset of Collins' representation, Collins repeatedly reassured Holland that Collins was aware of and would comply with the federal statute of limitations, and he sought Holland's "*complete confidence* and support." At the end of his representation, Collins told Holland (falsely) that the statute of limitations had expired before Collins had even begun his representation.[46]
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> • Holland filed, and the State successfully opposed as "nullities" – and got stricken – **two** *pro se* motions in the state postconviction trial court to add claims for relief, **two** *pro se* motions in the Florida Supreme Court to supplement the claims Collins had raised, and **two** *pro se* motions

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[46] Collins was aware of Holland's concern about federal habeas corpus: "I would like to *reassure* you that we are aware of state time-limitations and federal exhaustion requirements." J.A. 55 (emphasis added). Collins wrote to Holland on December 23, 2002, stating that once the issues in state court were exhausted, all Holland's legal issues "will then be ripe for presentation in a petition for writ of habeas corpus in federal court." J.A. 61.

in the Florida Supreme Court to remove Collins as counsel (one of which, if granted, would have allowed Holland to proceed *pro se*).

• Holland asked the Clerk of the Florida Supreme Court to provide him with one of the State's motions to strike, the State's Answer Brief, and the State's Response to the State Habeas Corpus Petition, because Collins had not provided them to him and Holland wanted to "know exactly what is happening with my case on appeal to the Supreme Court of Florida." The Clerk advised Holland that he would have to pay for copies by "submit[ting] a check or money order in the amount of $77.00 made payable to 'Clerk, Florida Supreme Court,'" or that Holland could contact his attorney or visit the Court's webpage.

• Holland twice asked for assistance from the Florida Bar, concerned that Collins was not preserving his federal habeas corpus rights with respect to certain claims, but the Bar dismissed both complaints.[47]

• Shortly after oral argument in the Florida Supreme Court in the appeal from denial of postconviction relief, Holland wrote to Collins instructing that "[i]f the Florida

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[47] *See* J.A. 207-208 ("What can I do to get all my legal issues before the Florida Supreme Court so that I can *exhaust state remedies*, so that my legal claims will not be procedurally barred when I get to the Federal Courts?") (emphasis added).

Supreme Court denies my 3.850-3.851 and State Habeas Corpus appeals, please file my 28 U.S.C. 2254 writ of habeas corpus petition, before my deadline to file it runs out (expires)." This letter went unanswered, and Holland wrote Collins again in June 2005, asking "have you begun preparing my 28 U.S.C. §2254 Writ of Habeas Corpus Petition? Please let me know, as soon as possible." No answer.

• On November 10, 2005, the Florida Supreme Court issued its decision affirming the denial of postconviction relief and denying Holland's petition for habeas corpus, Collins filed no motion for rehearing, and the Florida Supreme Court issued its mandate on December 1, 2005. Collins did not advise Holland of either the decision or the issuance of the mandate, and neither did the State or the Florida Supreme Court.

• In the dark about these developments, Holland asked the Florida Supreme Court Clerk to advise him of when the mandate had issued on direct appeal and was told to contact the Florida Archives for that information. He did so.

• Still ignorant of the Florida Supreme Court's actions, Holland wrote to Collins on January 9, 2006, requesting information about his case and re-emphasizing his desire to obtain federal habeas review. He asked: "Have my appeals been decided yet?" and he asked when the mandate had issued on

direct appeal "so that I can determine when the deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition . . . if my appeals before the Supreme Court of Florida are denied."

- On January 18, 2006, Holland first learned, on his own, that the Florida Supreme Court had affirmed the denial of relief on November 10, 2005, and issued its mandate on December 1, 2005. Holland immediately hand-wrote a *pro se* petition for writ of habeas corpus and mailed it to the federal district court, writing that Collins had "failed to undertake timely action."

The totality of these circumstances is extreme, and this Court should order that equitable tolling is warranted on this record.

### 1. Holland's Ability to File His Federal Petition Within the One-Year Statute of Limitations Was Hamstrung by an Extraordinary Combination of Crippling Circumstances.

Among the circumstances that the lower courts have considered "extraordinary" so as to warrant equitable tolling under the AEDPA are: that a petitioner had no notice that the state court had decided his case;[48] that state postconviction counsel was

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[48] *See Phillips v. Donnelly*, 216 F.3d 508 (5th Cir. 2000) (receiving notice of denial of state habeas corpus petition four

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grossly negligent;[49] and that the State or state court contributed to the lateness of the petitioner's

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months late may toll statute of limitations for diligent petitioner); *Diaz v. Kelly*, 515 F.3d 149 (2d Cir. 2008) (petitioner did not receive notice of completion of exhaustion and had made reasonable inquiries with the state court); *Jones v. Nagle*, 349 F.3d 1305 (11th Cir. 2003) (petitioner did not receive notice from state court that his properly-filed state petition had been denied); *Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002) (equitable tolling warranted where delayed notice that state court had reached final decision was beyond petitioner's control and petitioner exercised diligence); *Ramirez v. Yates*, 571 F.3d 993 (9th Cir. 2009) (prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter); *cf. Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, (1874) (relief available "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part.").

[49] *See Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003) (attorney error normally will not support equitable tolling, but attorney malfeasance may if it is "so outrageous or so incompetent" or "sufficiently egregious" as to render it extraordinary); *United States v. Martin*, 408 F.3d 1089 (8th Cir. 2005) (attorney consistently lied about the filing deadline and the status of the case; failed to file any documents; failed to return original paperwork; and refused to communicate despite petitioner's repeated efforts); *Stillman v. LaMarque*, 319 F.3d 1199 (9th Cir. 2003) (there are instances when an attorney's failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling appropriate); *cf. United States v. Saro*, 252 F.3d 449 (D.C. Cir. 2001) (even if the attorney's defalcation is the kind of extraordinary circumstance that warrants tolling, petitioner waited too long to file his motion after he knew that the attorney had not).

filings.[50] If one of these factors standing alone can be "extraordinary," their confluence in one case is beyond extraordinary.

They are all here. First, it is undisputed that Holland did not learn until January 18, 2006, that the Florida Supreme Court had decided his case on November 10, 2005, and issued its mandate on December 1, 2005. It is undisputed that he immediately prepared and filed a *pro se* petition for writ of habeas corpus in the district court. He did not sit on his rights. *See Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 429 (1965) (allowing equitable tolling where "plaintiff has not slept on his rights but, rather, has been prevented from asserting them").

Second, it is a given that Collins was "grossly negligent"; the Eleventh Circuit assumed he was, and with good reason.[51] But the court below then

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[50] Equity looks to the actions of both parties. If a petitioner is "'prevented in some extraordinary way from asserting his rights,'" *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999), particularly if "the state or [a] court . . . prevented him from asserting his rights," *Flores v. Quarterman*, 467 F.3d 484, 487 (5th Cir. 2006), then equitable tolling may be appropriate. Any "extraordinary circumstances beyond the prisoner's own conduct," *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir. 2003), may justify equitable tolling.

[51] Holland could do little more than "cajole [or] plead with his counsel to file the petition timely," *Downs v. McNeil*, 520 F.3d 1311, 1324 n.10 (11th Cir. 2008) (quoting *Thomas v. McDonough*, 452 F.Supp.2d 1203, 1206-07 (M.D. Fla. 2006)), and Holland did so. Collins' abandonment of Holland was absolute. Less than a month after oral argument was conducted in the Florida

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announced its bright-line rule that gross attorney negligence could never be relevant to equitable tolling. Under that rule, the *only* equitable considerations *vis-a-vis* attorney conduct are whether the lawyer acted in bad faith (or through divided loyalties), or lied, or was mentally ill; no other equitable considerations can be countenanced. This is inconsistent with this Court's language in *Pace* and *Lawrence*, the decisions of other circuit courts,[52] and

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Supreme Court, Holland wrote to Collins and asked: "please write me back, as soon as possible, to let me know what the status of my case is on appeal to the Supreme Court of Florida." J.A. 210. Holland further asked Collins to "please file my 28 U.S.C. 2254 writ of habeas corpus petition before my deadline to file it runs out (expires)" if the Florida Supreme Court denied the postconviction appeal and state habeas corpus. *Id.* Collins did not respond. On June 15, 2005, Holland wrote to Collins again asking if he had "begun preparing my 28 U.S.C. §2254 Writ of Habeas Corpus Petition? Please let me know as soon as possible." J.A. 212. Collins did not respond. The Florida Supreme Court decided Holland's appeal and later issued its mandate, but Collins did not tell Holland that. Holland wrote Collins again on January 6, 2006, pleading that, "if my appeals before the Supreme Court of Florida are denied," Collins would "preserve my privilege to federal review of all of my state convictions and sentences." J.A. 214. Collins knew Holland was desperate to learn the status of his case but kept him in the dark until too late.

[52] *See, e.g.*, *Baldayaque*, 338 F.3d at 152 ("It is not inconsistent to say that attorney error will *normally* not constitute the extraordinary circumstances required to toll the AEDPA limitations period while acknowledging that at some point, an attorney's behavior may be so outrageous or so incompetent as to render it extraordinary.") (emphasis in original); *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003) ("Though ordinary attorney negligence will not justify equitable

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the letter and spirit of equity principles. And even under the Eleventh Circuit's new rule, Holland ought to have been granted equitable tolling: Nowhere in this record has Collins denied Holland's repeated assertions that Collins deceived and misled Holland as to when Holland would file the federal habeas petition.[53]

Third, the State cannot claim clean hands. Every time Holland tried to speak in state court the State

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tolling, we have acknowledged that where an attorney's misconduct is sufficiently egregious, it may constitute an 'extraordinary circumstance' warranting equitable tolling of AEDPA's statute of limitations."); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005) (stating that "serious misconduct, as opposed to mere negligence, may warrant equitable tolling"); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), *abrogated in part by Carey v. Saffold*, 536 U.S. 214 (2002) (ordering evidentiary hearing on whether misconduct of petitioner's counsel qualifies as exceptional circumstance, noting that the lawyer "effectively abandoned" petitioner, failed to inform petitioner when the state supreme court denied review, "led [petitioner] to believe she was going to file the federal habeas petition on his behalf," and "told him that there were no time constraints for filing a petition. These are serious allegations, if true.").

[53] Collins told Holland at the beginning of his representation that he would protect Holland's ability to file a federal habeas petition. Collins told Holland at the conclusion of his representation that, at the time of his earlier assurances (when he asked for Holland's "complete confidence," "trust," and "support"), the AEDPA statute of limitations had already expired. Neither of these two things Collins told Holland was the truth.

successfully muzzled him;[54] it then tried to do the same in the district court.[55] Labeling all Holland's words a nullity, and being rewarded with six state orders striking everything Holland had to say, is an extraordinary circumstance.[56]

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[54] The State successfully opposed Hollands's *pro se* attempts to speak (1) in the state postconviction court (*i.e.*, his motion to include all federal claims in his Rule 3.850 motion, and his renewed motion at the outset of the state evidentiary hearing) and (2) in the Florida Supreme Court (*i.e.*, his request to include claims in his state habeas petition, his request to replace counsel, his renewed motion to amend his state habeas petition, and his motion to discharge counsel). Having successfully urged the state courts not to listen to Holland, the State should be equitably estopped from arguing here that Holland should have said more to the state courts. *See New Hampshire v. Maine*, 532 U.S. 742 (2001) (having succeeded in having the state court "accept that party's earlier position," *id.* at 750, a party may not now "'rely[ ] on a contradictory argument to prevail in another phase,'" *id.* at 749, of the litigation; the party should be estopped "from playing fast and loose with the courts" and "from deliberately changing positions according to the exigencies of the moment." *Id.* at 750).

[55] When Holland learned that the Florida Supreme Court had denied relief and had issued its mandate, he immediately hand-wrote a *pro se* habeas petition and, within 24 hours, mailed it to the federal district court. *The State moved to dismiss Holland's pro se* habeas petition: "Because Holland does not have a right to hybrid representation, his *pro se* Petition for Writ of Habeas Corpus, filed while he was being represented by Mr. Collins is a nullity." DE8 at 4. The State also argued that because Collins had already filed a petition for writ of certiorari in this Court, *that too warranted dismissal* of Holland's *pro se* habeas petition. DE8 at 2. *But see Roper v. Weaver*, 550 U.S. 598 (2007).

[56] Had the State not opposed Holland's request for a *Nelson* hearing, see *supra* note 13, and had the Court granted one,

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### 2. Holland's Diligence Was Far More Than Reasonably Can Be Expected of Someone in His Situation.

Although this Court has not defined "diligence,"[57] numerous lower courts have developed flexible standards not tied to rigid rules. "[M]aximum feasible diligence" is not required, only "'due,' or reasonable diligence." *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002). *See also Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003) ("The standard is not 'extreme diligence' or 'exceptional diligence,' it is *reasonable* diligence."); *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008) (it is not necessary that it be literally impossible for a petitioner to file on time). Due diligence does not require a habeas petitioner "to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts." *Baldayaque*, 338 F.3d at 153. The "due diligence" requirement is construed in light of a habeas petitioner's confinement in prison and any special restrictions that

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Holland could have discharged his attorney and then represented himself. In *Lawrence*, by contrast, the petitioner had "not alleged that the State prevented him from hiring his own attorney or from representing himself." *Lawrence*, 549 U.S. at 337.

[57] In *Pace*, the Court's discussion of diligence was limited to its conclusion that Pace lacked diligence because he failed to "advance[ ] his claims within a reasonable time of their availability" and sat "on his rights" before deciding to seek relief in federal court." *Pace*, 544 U.S. at 419.

incarceration might impose on such a person. *See Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000); *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000). But even were the standard stricter than this, Holland's efforts would satisfy it.

The Florida Supreme Court, the State, Collins, and the Florida Bar were all repeatedly alerted: Holland desperately wanted to preserve his federal rights. They all repeatedly responded: he could not file anything, his words were a nullity, and he could only speak through his attorney. When Holland informed the Florida Supreme Court that Collins would not even provide briefs to him, the Court denied Holland's motion to dismiss Collins, and the Clerk told Holland he could send in a money order from death row or go to the Court's webpage. These are not reasonable ways of giving notice to an indigent death row prisoner.[58] Had Holland been allowed to proceed *pro se*, as he requested, he would have been personally notified of the Florida Supreme Court's mandate and – as his later actions showed – filed the next day.

After all of this, the State and the court below heaped blame on Holland. The Eleventh Circuit wrote that Holland presented "no evidence that he ever

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[58] Nevertheless, Holland did ask for more information about the Court's online docket so he could attempt to get others to access the Court's webpage on his behalf. This is additional evidence of his due diligence; the fact that he was unsuccessful does not mean he was not diligent.

asked – before the limitations period for filing his federal petition had run – that the Florida Supreme Court provide him directly with notice of the decision on his postconviction appeal." J.A. 111. The Florida Supreme Court was quite aware that Holland was "not trying to get on your nerves. I just would like to know *exactly what is* happening with my case on appeal to the Supreme Court of Florida." J.A. 147 (emphasis in original). But even if the Florida Supreme Court were not aware that Holland was anxious to be kept advised of the status of his case, it is hardly likely that yet another letter from Holland would have resulted in his being notified when the appeal was decided. More importantly, why would Holland reasonably have thought another letter efficacious? The Court had silenced him with four orders and had demanded a money order for pleadings Collins should have provided him. A rule that, in order to show diligence, a petitioner represented by counsel must write an indeterminate number of letters to a state supreme court asking to be notified when the court decides his case would be a clerk's worst nightmare. And if it is required under the AEDPA, then it is required in all equitable tolling situations in federal court. That is inconceivable. *See* note 39, *supra*.[59]

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[59] *See Diaz v. Kelly*, 515 F.3d 149, 155 (2d Cir. 2008) ("no point in obligating a [] litigant to pester a state court with frequent inquiries as to whether a pending motion has been decided"); *see also Drew v. Dep't. of Corrections*, 297 F.3d 1278,

(Continued on following page)

Holland may not have been perfect, he may not have "undertake[n] repeated exercises in futility" or "exhaust[ed] every imaginable option." *Baldayaque*, 338 F.3d at 153. But he was diligent. And he faced impediments that were extraordinary under any analysis tethered to equitable principles. The lower court's new rigid rule blindly precluded equitable consideration of the special facts and circumstances presented here which, when fully considered, warrant equitable tolling.

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1299 (11th Cir. 2002) (Barkett, J., dissenting) ("Under the majority's approach, the failure of all of these prisoners to make inquiries about the progress of their cases subjects them to a risk of being found indiligent and thus ineligible for equitable tolling should any statute of limitations problem subsequently arise. Were all of these prisoners to do what the majority says [petitioner] should have done – send letters, make phone calls, and have relatives go to the court personally to make inquiries – the court clerks would be considerably busier than they already are. And of course, since equitable tolling may apply to a wide variety of lawsuits, the effect of the majority's reasoning is not confined to petitions filed by prisoners.").

## CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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December 23, 2009

## APPENDIX A

## Cases Illustrating Equitable Tolling Under Federal Statutes and for Federal Claims

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Age Discrimination in Employment Act. *See Prince v. Stewart*, 580 F.3d 571, 574-575 (7th Cir. 2009); *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 384 (3d Cir. 2007); *Coons v. Mineta*, 410 F.3d 1036, 1040 (8th Cir. 2005); *Bennett v. Coors Brewing Co.*, 189 F.3d 1221 (10th Cir. 1999); *Cada v. Baxter Heathcare Corp.*, 920 F.3d 446, 451 (7th Cir. 1990); *E.E.O.C. v. Kentucky State Police Dept.*, 80 F.3d 1086, 1094 (6th Cir. 1996); *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981); *Bassett v. Sterling Drug, Inc.*, 578 F.Supp. 1244, 1247-48 (S.D.Ohio 1984) (recognizing exception to ADEA limitations period if plaintiff adjudged mentally incompetent or institutionalized during filing period); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998) (en banc) (limitations period was equitably tolled as to those employees who were affirmatively misinformed by Equal Employment Opportunity Commission (EEOC) regarding statute of limitations); *Browning v. AT&T Paradyne*, 120 F.3d 222, 225-27 (11th Cir. 1997) (same); *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455, 459 (8th Cir. 1998) (misleading conduct of the EEOC in this case was sufficient to justify plaintiff's neglect; fact that she was represented by counsel did not preclude equitable tolling); *Browning v. AT&T Paradyne*, 120 F.3d 222 (11th Cir. 1997) (EEOC letter incorrectly informing employee that old, pre-Civil Rights Act

statute of limitations applied to his claim equitably tolled limitations period for the 18 days that complaint was untimely); *Albano v. Schering-Plough Corp.*, 912 F.2d 384 (9th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991) (equitable tolling granted where EEOC failed to follow its own rules, the plaintiff had at least 14 conversations with the EEOC attempting to amend, and on at least three occasions the agency's employee assured plaintiff that his new claim was encompassed within the claim being investigated); *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976) (equitable tolling where agency neglected to inform plaintiff of filing deadlines despite numerous phone conversations, at least once a month, to check on the progress of the investigation), *aff'd by an equally divided Court*, 434 U.S. 99 (1977) (per curiam).

Alien Tort Statute. *See Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (concluding that equitable tolling applied to time limits under ATS found in 28 U.S.C. § 1350).

Americans with Disabilities Act. *See Santa Maria v. Pacific Bell*, 202 F.3d 1170 (9th Cir. 2000) (concluding that equitable tolling applies to time limits for filing an action under ADA found in 42 U.S.C. § 12117(a)); *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1033 (8th Cir. 2005) (same); *Soignier v. American Bd. of Plastic Surgery*, 92 F.3d 547 (7th Cir. 1996) (plaintiff not entitled to equitable tolling of limitation period).

Appeals to the Department of Transportation for review of an airport charge under 49 U.S.C. § 47129(a)(1)(B). *See Alaska Airlines, Inc., et al. v. United States Dept. of Transportation*, 575 F.3d 750, 759 (D.C. Cir. 2009).

Appeals to the Court of Appeals for Veterans Claims. *See Barrett v. Nicholson*, 466 F.3d 1028, 1040 (Fed. Cir. 2007) (holding 120-day period for obtaining review of a final decision of the Board of Veterans' Appeals under 38 U.S.C. § 7266(a) is subject to equitable tolling); *Bailey v. Principi*, 351 F.3d 1381, 1383-84 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d 1293, 1296-97 (Fed. Cir. 2002).

Antitrust Cases under the Clayton Act. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997) (citing *Conmar Corp. v. Mitsui & Co.*, 851 F.2d 499, 502 (9th Cir. 1988) (recognizing that four-year filing period for antitrust actions under the Clayton Act, 15 U.S.C. § 15(b), is subject to equitable tolling for fraudulent concealment); *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 177 (4th Cir. 2007) (same); *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 832 (11th Cir. 1999) (same).

Bankruptcy. *See In re International Administrative Services, Inc.*, 408 F.3d 689, 699 (11th Cir. 2005) (concluding that time period for commencing avoidance actions found in 11 U.S.C. § 546(a)(1) is subject to equitable tolling, and concluding that period was tolled by the deliberate and intentional attempts of the debtor and its associates to hide their activities

from the trustee); *In re United Insurance Management, Inc.*, 14 F.3d 1380, 1385 (9th Cir. 1994) (noting that "[e]very court that has considered the issue has held that equitable tolling applies to § 546(a)(1)."); *In re Maughan*, 340 F.3d 337, 344 (6th Cir. 2004) (holding that deadlines found in Bankruptcy Rules 4004(a) and 4007(c) for filing complaints objecting to discharge under 11 U.S.C. §§ 523 and 727 are subject to equitable tolling, and concluding that plaintiff's diligence and defendant's delayed production of critical documents justified tolling of filing period); *In re Kontrick*, 295 F.3d 724, 733 (7th Cir. 2002) (concluding time periods in Rules 4004(a) and 4007(c) may be equitably tolled); *In re Benedict*, 90 F.3d 50 (2d Cir. 1996) (the time period imposed by Rule 4007(c) of Federal Bankruptcy Rules is subject to equitable tolling).

Bivens Action. *See Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996) (mistaken belief by counsel that exhaustion of administrative remedies was required prior to filing federal law suit against United States employees did not justify equitable tolling).

Civil Action for Deprivation of Rights. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (observing that § 1983 "generally borrows its statute of limitations from state laws . . . and incorporates equitable-tolling principles of either state or federal law in cases where a defendant's wrongful conduct, or extraordinary circumstances outside a plaintiff's control, prevented a plaintiff from timely asserting a

claim."); *Smith v. City of Chicago*, 951 F.2d 834, 841 (7th Cir. 1992) (federal courts, when borrowing state statutes of limitations, should apply the state doctrine of equitable tolling but the federal doctrine of equitable estoppel); *Cange v. Stotler & Co.*, 826 F.2d 581, 585-86 (7th Cir. 1987) (same); *Keating v. Carey*, 706 F.2d 377, 382 (2d Cir. 1983) (holding federal courts should apply the state's equitable estoppel doctrine when borrowing a state's statute of limitations); *Donald v. Cook County Sheriff's Dept.*, 95 F.3d 548, 562 (7th Cir. 1996) (on remand, district court "should determine whether the balance of equities favors tolling the statute of limitations to allow Donald to bring this suit against the individual defendants, once they are identified.").

Civil Service Reform Act. *See Montoya v. Chao*, 296 F.3d 952 (10th Cir. 2002) (concluding 30-day filing period in CSRA, 5 U.S.C. § 7703(b)(2), is subject to equitable tolling in appropriate case); *Nunnally v. MacCausland*, 996 F.2d 1 (1st Cir. 1993); *Williams-Sciafe v. Dep't of Defense Dependent Schools*, 925 F.2d 346 (9th Cir. 1991); *Nunnally v. MacCausland*, 996 F.2d 1, 4-5 (1st Cir. 1993) (mental illness is an appropriate basis for tolling 30-day filing period set forth in CSRA).

Commodity Exchange Act. *See Haekal v. Refco, Inc.*, 198 F.3d 37, 43 (2d Cir. 1999) (concluding that two-year period for applying for reparations and posting requisite bond under CEA, 7 U.S.C. § 18(a)(1), is subject to equitable tolling).

Comprehensive Environmental Response, Compensation and Liability Act. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997) (but denying equitable tolling where delay in initiating lawsuit was due to excusable neglect).

Contract Disputes Act. *See Arctic Slope Native Assoc., Ltd. v. Sebelius*, 583 F.3d 785, 791 (Fed. Cir. 2009) (holding six-year period for filing administrative claims under CDA, 41 U.S.C. § 605(a), is subject to equitable tolling).

Copyright Act. *See Maurizio v. Goldsmith*, 230 F.3d 518, 520 (2d Cir. 2000) (concluding that equitable tolling applied to Copyright Act's three-year statute of limitations); *Pentagen Technologies Intern. Ltd. v. U.S.*, 175 F.3d 1003 (Fed. Cir. 1999) (plaintiff not entitled to equitable tolling of three-year limitation period of Copyright Act where plaintiff failed to allege in complaint concealment of infringement by defendant or that plaintiff was unaware of infringement during limitation period).

Employment Retirement Income Security Act. *See Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 875 (7th Cir. 1997) (equitable tolling of ERISA time limits available in suits for breach of fiduciary duty and for ERISA benefits); *Veltri v. Building Service 32B-J Pension Fund*, 393 F.3d 318, 322-23 (2d Cir. 2004) (concluding six-year statute of limitations applicable to suits challenging denial of benefits is subject to equitable tolling); *Gayle v. United Parcel Service, Inc.*, 401 F.3d 222 (4th Cir.

2005); *I.V. Services of America, Inc. v. Inn Development & Management, Inc.*, 182 F.3d 51 (1st Cir. 1999); *but see Radford v. General Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998) ("Section 413 of ERISA is a statute of repose, establishing an outside limit of six years in which to file suit, and tolling [during administrative exhaustion] does not apply.").

Equal Access to Justice Act. *See Townsend v. Comm'r of Soc. Sec.*, 415 F.3d 578 (6th Cir. 2005) (concluding that 30-day period for seeking reimbursement under EAJA, 28 U.S.C. § 2412(d)(1)(B), may be equitably tolled).

Equal Pay Act. *See O'Donnell v. Vencor, Inc.*, 465 F.3d 1063, 1068 (9th Cir. 2006) (concluding equitable tolling is available to toll applicable EPA limitations period under 29 U.S.C. § 255(a), and concluding that defendants' filing for bankruptcy equitably tolled limitations period).

Fair Labor Standards Act. *See Chao v. Virginia Dep't of Transportation*, 291 F.3d 276 (4th Cir. 2002) (concluding that equitable tolling applies to 29 U.S.C. § 255, the three-year time period within which Secretary of Labor may sue to obtain an injunction to restrain an employer from continuing to withhold unpaid overtime compensation due an employee).

Federal Arbitration Act. *See Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (recognizing that equitable tolling

applies to three-month period under FAA, 9 U.S.C. § 12, to file motion to vacate arbitration award).

Federal Election Campaign Act. *See Federal Election Com'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (recognizing that equitable tolling can apply to default statute of limitations at issue here, 28 U.S.C. § 2462).

Federal Tort Claims Act. *See Santos v. United States*, 559 F.3d 189 (3d Cir. 2009) (concluding equitable tolling applies to FTCA's two-year limitations period, 28 U.S.C. § 2401(b), and concluding that equitable tolling was warranted in medical malpractice action under FTCA due to plaintiff's exemplary diligence and the fact that she could not have determined despite that diligence that the defendants – who appeared to be private entity – were, in fact, federal employees); *Hertz v. United States*, 560 F.3d 616, 619 (6th Cir. 2009) (recognizing that equitable tolling applies to § 2401(b); *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 963 (8th Cir. 2006) (same); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) (same); *Muth v. United States*, 1 F.3d 246, 250-51 (4th Cir. 1993) (same). *But see Marley v. United States*, 548 F.3d 1286, 1289 (9th Cir. 2008) (holding FTCA's statute of limitation is jurisdictional and therefore equitable tolling does not apply).

Financial Institution Reform, Recovery, and Enforcement Act. *See Carlyle Towers Condominium Ass'n, Inc. v. F.D.I.C.*, 170 F.3d 301 (2nd Cir. 1999) (notice provisions of 12 U.S.C. § 1821(d)(3)(C)(ii) do not

impose a jurisdictional bar and are subject to equitable tolling).

Food Security Act. *See Von Eye v. United States*, 92 F.3d 681 (8th Cir. 1996) (time limitation in regulations concerning wetlands conversion activities could be equitably tolled).

Forfeiture. *See United States v. All Funds Distributed to, or O/B/O Weiss*, 345 F.3d 49, 51 (2d Cir. 2003) (concluding that one-year period under 18 U.S.C. § 984(c) for government to file forfeiture action against proceeds of pension plan can be equitably tolled, and allowing tolling of time during which distribution of pension plan funds to plan beneficiaries was prevented by certain ERISA provisions); *United States v. Clymore*, 245 F.3d 1195 (10th Cir. 2001) (concluding equitable tolling can extend five-year period allowed under 19 U.S.C. § 1621 for government to institute forfeiture actions).

General Civil Actions Against United States. *See Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000) (holding that 28 U.S.C. § 2401(a), which states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues," is subject to equitable tolling, and granting equitable tolling where defendant seeking return of forfeited property timely filed action but did so in the wrong venue because of uncertainty in the law).

International Child Abduction Remedies Act. *See Furness v. Reeves*, 362 F.3d 702, 723-24 (11th Cir.

2004) (concluding that equitable tolling applied to one-year period for filing suit under ICARA, and was warranted where abducting parent concealed child's location and parent seeking return undertook "extensive efforts" to locate child); *Duarte v. Bardales*, 526 F.3d 563, 568 & n.7 (9th Cir. 2008) (same).

Jones Act. *See Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1120 (9th Cir. 2006) (concluding three-year period for filing civil action for damages for personal injury or death arising out of a maritime tort, 46 U.S.C.A. § 30106, is subject to equitable tolling).

Labor Management Relations Act. *See Chapple v. National Starch & Chemical Company and Oil*, 178 F.3d 501 (7th Cir. 1999) (finding plaintiffs not entitled to equitable tolling where they failed to show they could not have filed suit within limitation period).

Mandatory Victims Restitution Act. *See United States v. Dando*, 287 F.3d 1007, 1011 n.5 (10th Cir. 2002) (holding 90-day time period for district court to enter restitution order found in MVRA, 18 U.S.C. § 3664(d)(5), is subject to equitable tolling if the delay in entering the restitution order is attributable to the defendant); *United States v. Stevens*, 211 F.3d 1, 4-5 (2d Cir. 2000) (same).

National Flood Insurance Act. *See Gibson v. American Bankers Ins. Co.*, 289 F.3d 943, 946 (6th Cir. 2002) (concluding one-year time period for claims under NFIA, 42 U.S.C. § 4072, may be equitably tolled).

Quiet Title Act. *See Fadem v. United States*, 113 F.3d 167 (9th Cir. 1997) (distinguishing *Brockamp* and finding that the statute of limitations in the Quiet Title Act, 28 U.S.C. § 2409a(g), is subject to equitable tolling.)

Racketeer Influenced and Corrupt Organizations Act. *See Rotella v. Wood,* 528 U.S. 549, 560-61 (2000) (recognizing that limitations period for civil RICO actions may be equitably tolled where defendants engaged in fraudulent concealment); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997).

Railroad Unemployment Insurance Act. *See Wakefield v. Railroad Retirement Bd.*, 131 F.3d 967 (11th Cir. 1997) (petitioner failed to show entitlement to equitable tolling of the limitations period for filing an appeal of Railroad Retirement Board ruling.)

Railway Labor Act. *See Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transportation, Inc.*, 522 F.3d 1190 (11th Cir. 2008) (limitations period for enforcement actions under RLA, 45 U.S.C. § 153(r), may be equitably tolled).

Real Estate Settlement and Procedures Act. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166-67 (7th Cir. 1997) (recognizing application of equitable tolling to one-year limit for filing claims under RESPA, 12 U.S.C. § 2614).

Rehabilitation Act. *See Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996) (limitations statute codified equitable

tolling doctrine where filing within time period was not possible due to circumstances beyond the plaintiff's control).

Restitution. *See United States v. Terlingo*, 327 F.3d 216, 221 (3d Cir. 2003) (concluding that 18 U.S.C. § 3664(d)(5)'s requirement that restitution be ordered within 90 days of criminal sentencing was subject to equitable tolling when the delay is caused in significant part by the defendant); *United States v. Dando*, 287 F.3d 1007, 1011 (10th Cir. 2002); *United States v. Stevens*, 211 F.3d 1, 4-5 (2d Cir. 2000).

Security Exchange Act. *See Securities & Exchange Commission v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009) (holding five-year period for SEC to file civil action asserting violations of federal securities law, 28 U.S.C. § 2462, is subject to equitable tolling for fraudulent concealment); *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 527 n.9 (9th Cir. 1981) (holding that an insider's failure to disclose covered transactions in the reports required by § 16(a) of the Security Exchange Act of 1934, 15 U.S.C. § 78p, equitably tolls the two-year limitations period for suits under § 16(b) of the SEA to recover profits connected with such a non-disclosed transaction); *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203 (2d Cir. 2004) (same).

Social Security Act. *See Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (concluding 60-day deadline under 42 U.S.C. § 405(g) for filing an action in district court seeking review of decision from Appeals Council of Social Security Administration is subject to equitable tolling). *But see Acierno v. Barnhart*, 475 F.3d

77 (2d Cir. 2007) (refusing to equitably toll the time limitation set forth at 42 U.S.C. § 405(c)(1)(B) and (c)(4) for correcting records of self-employment income kept by the Commissioner of Social Security).

Suits in Admiralty Act. *See Rashidi v. American President Lines*, 96 F.3d 124, 127 (5th Cir. 1996) (two-year period for filing SAA suits under 46 U.S.C. § 745 may be equitably tolled).

Tariff Act. *See US JVC Corp. v. U.S.*, 184 F.3d 1362, 1365 (Fed. Cir. 1999) (importer not entitled to equitable tolling where own lack of diligence caused the untimely filing.)

Title VII of the Civil Rights Act of 1964. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990); *Prince v. Stewart*, 580 F.3d 571, 574-75 (7th Cir. 2009); *Abraham v. Woods Hole Oceanographic Institute*, 553 F.3d 114, 119 (1st Cir. 2009); *Brown v. Parkchester South Condominiums*, 287 F.3d 58, 60 (2d Cir. 2002); *Hoffman v. Rubin*, 193 F.3d 959 (8th Cir. 1999); *Fouche v. Jekyll Island State Park Authority*, 713 F.2d 1518, 1525 (11th Cir. 1983) ("[A]ll Title VII procedural requirements to suit are henceforth to be viewed as conditions precedent to suit rather than as jurisdictional requirements."); *Weick v. O'Keefe*, 26 F.3d 467, 470-71 (4th Cir. 1994) (granting equitable tolling in light of deliberate misconduct by Navy personnel); *Brown v. Crowe*, 963 F.2d 895, 899-900 (6th Cir. 1992) (applying doctrine of equitable tolling where filing

would have been within the 300-day limit but for agency oversight and defendant was not prejudiced); *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1176 n.6 (9th Cir. 1999) (on remand, district court might decide whether plaintiff was entitled to equitable tolling); *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40, 42 (4th Cir. 1993) (although limitations period is triggered when the Postal Service delivers notice to plaintiff that right-to-sue letter is available for pickup, and not when the letter is actually picked up, equitable tolling is available to remedy any resulting injustices); *Zillyette v. Capital One Financial Corp.*, 179 F.3d 1337, 1342 (11th Cir. 1999) ("hardships to plaintiffs can be accommodated by the equitable tolling rules, which are generally applicable in Title VII actions against both private and government employers."); *Moody v. Bayliner Marine Corp.*, 664 F.Supp. 232, 235 (E.D.N.C. 1987) (mental incapacity may toll Title VII limitations period "in rare circumstances"); *Stoll v. Runyon*, 165 F.3d 1238 (9th Cir. 1999) (plaintiff entitled to equitable tolling despite fact that she was represented by counsel where mental disabilities allegedly caused by defendant left plaintiff unable to communicate directly with the lawyer who represented her in the EEOC); *Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir. 1998) (misleading information provided by EEOC was basis for equitable tolling of filing requirement); *but see Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999) ("First Circuit law permits equitable tolling only where the employer has actively misled the employee.").

Torture Victims Protection Act. *See Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (concluding ten-year time period to bring suit under TVPA, 28 U.S.C. § 1350, is subject to equitable tolling, and affirming district court's conclusion that the pervasive violence that consumed El Salvador until that country first held national elections following the signing of its peace accord justified equitable tolling); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (noting that Senate Report on TVPA states that the ten-year statute is subject to equitable tolling).

Truth in Lending Act. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166-67 (7th Cir. 1997) (holding time period for filing action under TILA, 15 U.S.C. § 1640(e), is subject to equitable tolling). *Accord Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998); *Ramadam v. Chase Manhattan Corp.*, 156 F.3d 499 (3d Cir. 1998); *Jones v. TransOhio Savings Assn.*, 747 F.2d 1037, 1041 (6th Cir. 1984). *But see Hardin v. City Title & Escrow Corp.*, 797 F.2d 1037, 1039-40 & n.4 (D.C. Cir. 1986); *King v. State of California*, 784 F.2d 910 (9th Cir. 1986).

Veteran's Employment Opportunities Act of 1998. *See Kirkendall v. Dept. of the Army*, 479 F.3d 830, 835-44 (Fed. Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 375 (2007) (equitable tolling applies to the sixty-day filing window at the Department of Labor under the VEOA, 5 U.S.C. § 3330a).

Wrongful Death Action. *See Booth v. Carnival Corp.*, 522 F.3d 1148 (11th Cir. 2008) (concluding one-year contractual limitation period for filing wrongful death action could be equitably tolled, and finding period equitably tolled where action was timely filed in state court, and state court had jurisdiction over action, but was not proper venue under contract).

# RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
JAN 22 2010
OFFICE OF THE CLERK

No. 09-5327

In the Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner,*

v.

STATE OF FLORIDA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

# BRIEF OF RESPONDENT

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## CAPITAL CASE
## QUESTION PRESENTED

Whether equitable tolling is available under the Antiterrorism and Effective Death Penalty Act (AEDPA), and, if so, whether the Eleventh Circuit properly denied Petitioner's contention that he is entitled to equitable tolling of the limitations period based on the alleged "gross negligence" of his counsel?

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## OPINION BELOW

The August 18, 2008 decision of the United States Court of Appeals for the Eleventh Circuit is reported as *Holland v. Florida*, 539 F.3d 1334 (11th Cir. 2008). [JA 102][1] The district court's order dismissing Holland's petition for writ of habeas corpus as untimely filed is unreported. [JA 81-94] The district court's order denying Holland's motion to alter or amend judgment is unreported. [JA 95-101]

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal habeas statute of limitations is found in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d), which provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or

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[1] References to the Joint Appendix are "JA" followed by page number(s); references to district court docket entries are "DE" followed by docket number(s); references to the Petitioner's Brief are "Br." followed by page number(s).

> the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In addition, 28 U.S.C. § 2254, entitled "State custody; remedies in federal court," includes subsection (i), which states:

> (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

## INTRODUCTION

This case asks who bears the risk in federal post-conviction proceedings of attorney negligence that causes an untimely filing of a habeas petition on behalf of an incarcerated offender? Under the Antiterrorism and Effective Death Penalty Act (AEDPA), should the conduct of the post-conviction attorney be imputed to the client, thereby barring equitable relief, or may a court equitably toll the clear statutory deadline despite the intent of Congress to avoid delays and promote finality in post-conviction proceedings, particularly those involving the death penalty?

Here, Petitioner Albert Holland asks that this Court establish a new rule that excuses the late filing of a habeas petition arising from negligence on the part of his post-conviction attorney. Such a rule, giving courts the discretion to lengthen the federal habeas statute of limitations for attorney negligence, contravenes Congress's clear intent to establish filing deadlines and expedite federal habeas review. This new rule would open the door to potentially lengthy and costly rounds of collateral proceedings in which courts must determine the nature of the alleged attorney misconduct and whether that conduct meets some sufficiently high threshold to warrant equitable relief from the statutory deadline established in AEDPA.

This Court and others have recognized that attorneys make mistakes and miss deadlines, but that fact alone does not warrant equitable relief in the post-conviction context in light of AEDPA's purpose and structure. Indeed, the Court has held that the Constitution does not require states to provide post-

conviction counsel, nor does a convicted offender have a right to effective post-conviction counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Coleman v. Thompson*, 501 U.S. 722 (1991). For this reason, the Court has denied equitable relief for attorney negligence resulting in late filings, assuming that such relief is even available under AEDPA. *See Lawrence v. Florida*, 549 U.S. 327 (2007).

As discussed below, it is doubtful that Congress intended that equitable tolling exist under AEDPA in any case, in light of the specific grounds in section 2244(d)(1) for delaying the running of the statute of limitations and the specific ground for tolling in section 2244(d)(2). To allow Holland and others similarly situated to obtain relief based on the negligence of their attorneys would circumvent the statutory time period for filing petitions established in AEDPA. It would also undermine *Lawrence* and the principles of *Coleman*, as well as Congress's intent to structure the habeas process to provide true deadlines and eliminate unnecessary delays in federal proceedings. Assuming equitable tolling exists, this Court should reject Holland's proposed tolling rule. The prevailing rule should be that attorney conduct in the post-conviction process is imputed to the client and cannot warrant equitable relief absent extraordinary and unavoidable circumstances beyond the control of the litigant and his attorney. Alternatively, the Eleventh Circuit's standard, which limits equitable relief to very narrow categories of attorney misconduct, should prevail and bar relief in Holland's case.

## STATEMENT OF THE CASE

Holland was indicted for the first-degree murder of a police officer, armed robbery, sexual battery, and attempted first-degree murder,[2] all four counts stemming from incidents that occurred on July 29, 1990. *Holland v. State*, 636 So. 2d 1289, 1290 (Fla. 1994). The jury found Holland guilty as charged on all counts, and recommended a sentence of death by a vote of 11 to 1. *Id.*

Holland was sentenced to death on August 19, 1991, for the first-degree murder of Officer Scott Winters; however, his convictions and sentences were reversed by the Florida Supreme Court. *Id.* at 1293. The Florida Supreme Court held that Holland's Fifth and Sixth Amendment rights were violated by the admission of testimony from a state psychiatrist who had interviewed Holland in jail without prior notice to defense counsel. *See id.* at 1292-93. This Court denied the State's petition for certiorari. *See Florida v. Holland*, 513 U.S. 943 (1994).

Holland was re-tried and was again found guilty as charged on the first-degree murder, armed robbery, and attempted first-degree murder counts. *Holland v. State*, 773 So. 2d 1065, 1068 (Fla. 2000). The jury also found Holland guilty of the lesser-included offense of attempt to commit sexual battery.

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[2] The four counts in the indictment were: Count I, the first-degree murder of Officer Scott Winters with a firearm; Count II, armed robbery of Officer Scott Winters; Count III, sexual battery on Thelma Smith Johnson with a deadly weapon or physical force likely to cause serious personal injury; and Count IV, attempted first-degree murder of Thelma Smith Johnson with a deadly weapon.

*Id.* The jury recommended a sentence of death by a vote of 8 to 4. *Id.* On February 7, 1997, the trial court sentenced Holland to death for the first-degree murder of Officer Winters and to a consecutive life sentence for the armed robbery of Officer Winters, as well as consecutive thirty and fifteen-year sentences for the crimes involving Thelma Smith Johnson.[3]

Holland appealed his convictions and sentences to the Florida Supreme Court. Following oral argument,[4] the court affirmed Holland's convictions and sentences, setting out the following facts:

> Holland attacked a woman he met on July 29, 1990. Holland ran off after a witness interrupted the attack. Police officers responding to a call about the attack found the woman semi-conscious with severe head

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[3] The trial court found the following aggravating circumstances: (1) the defendant was previously convicted of a felony involving the use or threat of violence to a person; (2) the capital felony was committed while the defendant was engaged in the commission of, or in an attempt to commit, or flight after committing or attempting to commit the crime of robbery or an attempt to commit the crime of sexual battery or both; and (3)(a) the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, merged with (3)(b) the victim of the capital felony was a law enforcement officer engaged in the performance of his legal duties. *Holland*, 773 So. 2d at 1068. The court did not find that any statutory mitigating circumstances were established, but did find the existence of two non-statutory mitigating circumstances: (1) history of drug and alcohol abuse, and (2) history of mental illness. *Id.* Both of these factors were given little weight.

[4] Archived videos of the Florida Supreme Court oral argument in this case as well as Holland's state post-conviction proceeding can be found at: http://wfsu.org/gavel2gavel/archives/index.html (Sept. 1, 1999 & Feb. 10, 2005) (last visited Jan. 21, 2010).

> wounds. Officer Winters and other officers began searching for the man believed to have been involved in the attack. A short time later, witnesses saw Officer Winters struggling with Holland. During the struggle, Holland grabbed Officer Winters' gun and shot him. Officer Winters died of gunshot wounds to the groin and lower stomach area.

*Holland*, 773 So. 2d at 1068 (Fla. 2000). Holland filed a petition for writ of certiorari to this Court, which denied the petition on October 1, 2001. *Holland v. Florida*, 534 U.S. 834 (2001). The one-year time period within which to file a federal habeas petition therefore began to run on this date.

From November 8, 2001, until he withdrew in May 2006, attorney Bradley M. Collins represented Holland, who began periodically writing letters to his attorney and filing unauthorized *pro se* supplements.[5] During the time his state post-conviction proceedings were pending in the Florida Supreme Court, Holland sent two letters to Collins in which he inquired about his appeal and his potential federal habeas petition; Collins did not respond. *See* [JA 104, 210, 212, 214, & 218]; *Holland v. Florida*, 539 F.3d 1334, 1337 (11th Cir. 2008). Holland also contacted the Florida Supreme Court about the use of its website to keep him updated about the status of his appeal. *See* [JA 122, 123, & 146]; *Holland*, 539 F.3d at 1337. Collins communicated to Holland during the state post-

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[5] As noted by the Eleventh Circuit, Holland twice moved the state court to remove Collins and appoint new counsel in 2004, but both *pro se* motions were denied. *See* [JA 134; 149; 192]; *Holland v. Florida*, 539 F.3d 1334, 1337 n.3 (11th Cir. 2008).

conviction proceedings concerning the issues to be raised, the handling and status of the case, and Holland's potential federal habeas petition. [JA 13, 38, 55, 57, 61, 62, 64, 79]

Nearly the entire one-year period within which to file a federal habeas petition had expired before Holland initiated state court post-conviction proceedings. On September 19, 2002, Holland, through Collins, petitioned to vacate his convictions and sentences in the state trial court, raising eight claims based on ineffective assistance of counsel and the fundamental unfairness of his trial and sentence.[6] [JA 84, 103] Holland attempted during his state court proceedings to file *pro se* supplements to the issues presented by Collins, but Holland's filings were struck by the court because he was represented by counsel. [JA 24, 30, 104 n.3] The state trial court held an evidentiary hearing and found all claims to be without merit or procedurally barred. [JA 83]

Holland (again through counsel) appealed the denial of his post-conviction motion to the Florida Supreme Court and also filed a state petition for writ of habeas corpus based on ineffective assistance of appellate counsel. *Holland v. State*, 916 So. 2d 750, 753 (Fla. 2005). Following oral argument, the Florida Supreme Court affirmed the denial of the post-conviction motion and denied the habeas petition in a

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[6] In addition to various claims of ineffective assistance of trial counsel, Holland also claimed that his death sentence is unconstitutional because a judge determined the aggravating circumstances instead of a jury, in violation of the Sixth, Eighth, and Fourteenth Amendments and this Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

unanimous twenty-two page opinion dated November 10, 2005. *Id.* The Florida Supreme Court issued its mandate on December 1, 2005.

Holland wrote to Collins in January 2006 inquiring about the status of his state court proceedings, but did not learn about the denial of his post-conviction appeal until January 18, 2006. *See* [JA 220]; *Holland*, 539 F.3d at 1337. On January 31, 2006, Holland received a letter from Collins in which Collins mistakenly stated that the time period to file a federal habeas petition had passed nearly a year prior to his appointment in November 2001. [JA 78-79] Collins was under the mistaken belief that the time in which to file a federal habeas petition would begin to run on the day the Florida Supreme Court denied relief on Holland's direct appeal in October 2000, when in fact the time did not begin to run until a year later when certiorari was denied by this Court. *See id.*

On February 8, 2006, Holland (through counsel) filed a petition for writ of certiorari in this Court, which was denied on April 17, 2006. Before the petition was filed, however, Holland filed a *pro se* petition for writ of habeas corpus in the federal district court on January 19, 2006. [JA 181][7] Collins sent Holland a proposed federal habeas petition on March 22, 2006, which by implication indicates that Collins intended to argue that equitable tolling should

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[7] Holland points out a discrepancy with the filing date of his state post-conviction motion. [Br. 5 n.4] As the district court noted [JA 82 n.2], Holland claims a filing date of September 17, 2002, while the state claims September 19, 2002 (a date which the Eleventh Circuit cited). [JA 103] Whether 36 or 38 days late, Holland's federal habeas petition was untimely.

apply to allow the late filing in federal court. [DE 20] Holland did not respond to this proposed petition, and the state court permitted Collins to withdraw in May 2006. [DE 17] The district court appointed current counsel, Todd G. Scher, to represent Holland in June 2006. [DE 22]

The district court ordered the State to show cause why the petition for habeas corpus should not be granted, calling "particular attention to the timeliness of the petition in light of the limitations period." [DE 9] The State's response asserted that Holland's time had expired. [DE 14] In his reply, Holland asserted that his petition was timely and also that he was entitled to equitable tolling. [DE 35] The State's sur-reply followed. [DE 41]

On April 27, 2007, the district court entered a detailed order dismissing Holland's section 2254 petition as untimely, holding that equitable tolling was not appropriate under the facts alleged.[8] [DE 46] At the outset, the court held that the pendency of Holland's petition for certiorari in this Court from his state habeas proceedings did not toll the time for filing his federal habeas petition in light of *Lawrence v. Florida*, 549 U.S. 327 (2007). [JA 83-84] The court rejected the contention that Holland could await the outcome in *Lawrence*. [JA 84 (noting that the "parties had been awaiting" the *Lawrence* decision)]

Next, the court rejected five arguments Holland advanced for equitable tolling. First, it rejected the

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[8] The district court based its order on proffered evidence and did not hold an evidentiary hearing to assess factual allegations, such as those in Holland's merits brief claiming that Collins "deceived," "misled," or "betrayed" him. [Br. 35, 57]

argument that the alleged failure of the Florida Supreme Court to oversee attorney Collins is an extraordinary circumstance justifying equitable tolling. [JA 86] This Court in *Lawrence* had rejected such an argument. [JA 86]

Second, the district court held that the alleged failure of the Florida Supreme Court to inform Holland that the mandate had issued in his state habeas appeal "misses the mark." [JA 87] The court noted that, in contrast to cases where a court clerk specifically assures litigants that they will be notified of a decision or mandate in a case, Holland "never argues that someone in the Clerk's Office promised to inform him of the outcome of his case." [JA 87] It found "no evidence" that Holland ever contacted the Florida Supreme Court to request a copy of its decision or mandate denying post-conviction relief. [JA 87] The court pointed out that Holland contacted the Florida Supreme Court clerk for other reasons [JA 87],[9] but he failed to ask that he be given notice of the mandate in his state post-conviction proceeding, such that no assurance from the clerk could have been given. [JA 87-88]

Third, the district court held that Holland's claim of denial of access to the writ room on one occasion, which is akin to denial of access to a prison law library, was supported by "no specific information" about how the alleged denial of access

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[9] The district court provided a detailed deconstruction and rejection of Holland's attempts to "conflate" his claimed contacts with the Florida Supreme Court clerk into a request for the decision in his state post-conviction proceeding, finding either no supporting evidence or that Holland's characterizations of such contacts are inaccurate. [JA 88 n.4]

delayed his filing of a federal petition or what other efforts Holland made. [JA 90] Holland's "bald assertion" was simply insufficient. [JA 90]

Fourth, the district court rejected Holland's claim that his counsel failed to communicate with him and that his counsel's failure to file a timely habeas petition was an extraordinary circumstance warranting equitable tolling. As to Holland's claim that Collins failed to keep him adequately informed about his case, the court concluded otherwise:

> The record shows that Collins met with [Holland] on death row and communicated with him in writing on several occasions, provided to [Holland] a detailed, written explanation of the strategy for the case, pursued state collateral relief for [Holland], and filed a petition for writ of certiorari from the United States Supreme Court. Collins had prepared a proposed federal habeas petition on [Holland's] behalf and sent it to [Holland] for his review, suggesting that Holland either sign the Petition for filing or indicate that he would prefer [Collins] comply with Holland's repeated requests that [Collins] move the trial court for leave to withdraw as counsel. ... *[Holland] never responded to Collins' correspondence.*

[JA 90-91 (emphasis added) (footnotes and citations omitted)][10] The district court also concluded, based on

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[10] The court noted that the record had "at least eight letters" to Holland from Collins [JA 91 n.6] and that Holland had no right to "hybrid" representation, which is the ability to "proceed *pro se* while simultaneously being represented by an attorney." [JA 91-92 n.8]

the evidence, that Holland was not only non-responsive to his counsel but that "[r]ather than cooperate with Collins, [Holland] filed numerous *pro se* motions during the time Collins represented him." [JA 91] Moreover, the court credited Collins's statement that Holland "has complained of conflicts with every counsel he has had since the beginning of his case, including trial counsel in his first trial and again different counsel in his retrial." [JA 92]

As to Holland's claim that Collins acted negligently, the trial court noted that it is "well settled that attorney negligence in calculating deadlines and understanding the law on habeas relief is not a basis for equitable tolling." [JA 90] The court noted that the Florida Bar, which received a complaint from Holland regarding Collins, initiated no investigation because the issues that Holland raised "did not rise to the standard of a violation of the Rules Regulating The Florida Bar." [JA 92 n.9] Even if Holland believed his attorney was careless or negligent, the district court found that Holland did not make the necessary showing of his own diligence because the record showed:

> that he wrote a few letters to his attorney, but did not seek any help from the court system to find out the date mandate issued denying his state habeas petition, nor did he seek aid from "outside supporters" he claimed he wanted to enlist to help him. This does not establish due diligence.

[JA 92]

Finally, the district court rejected Holland's allusion to "his long history of mental illness as a

basis for equitable tolling." [JA 93] The court noted that Holland's claim was contradicted by his "numerous, cogent letters" to his attorney, the courts, the Department of Corrections, and The Florida Bar. [JA 93] "What this shows is that Petitioner was certainly capable of using due diligence to ascertain his filing deadline for the instant habeas petition, but did not." [JA 93]

In response to Holland's motion to alter or amend judgment, the district court issued an order addressing why Holland was not entitled to relief. First, Holland claimed that he could not have done more to determine when the mandate issued in his state post-conviction proceeding. The court again rejected his contention, stating that Holland reasonably could have done more under the circumstances:

> For example, Petitioner could have contacted the Florida Supreme Court directly to inquire about the pending appeal of his state post-conviction application. Specifically, he could have asked to be copied on the issuance of the mandate given his narrow window for seeking federal relief and his lack of confidence in his appointed lawyer. Petitioner undeniably knew that the state appeal had been pending for quite some time, and knew that the mandate would trigger the time to file his federal habeas petition. Petitioner knew how to contact the Florida Supreme Court, and did so on several occasions for other reasons.

[JA 98] The district court further stated:

> Petitioner also had experienced perceived conflicts with his appointed counsel, and had

> expressed concerns to him about the issuance of the mandate and the running of the limitations clock. When those concerns went unaddressed, a reasonable person in his position would have done more to protect his interest in filing a federal habeas petition. The evidence submitted by Petitioner shows that he was decidedly not "in the dark" about his circumstances. Indeed, Petitioner ultimately overcame whatever reliance he had placed on his appointed counsel and filed his own habeas petition *pro se*. Hence, even if counsel's failure to contact Petitioner was an "extraordinary circumstance," and not merely based on an erroneous reading of the rule (i.e., that the limitations period had already run so there was no urgency in filing a habeas petition with this Court or with notifying his client), Petitioner did not do enough to overcome the circumstances he found himself in.

[JA 99] Finally, the district court rejected Holland's contentions that the one-time denial to the writ room supported relief. The court noted that "even if they had granted him access on January 9th, the limitations period had already run on his federal petition." [JA 100] The court continued:

> While this one belated attempt to go to the writ room is some evidence of diligence, one attempt is not enough to establish tolling given that he did not undertake other reasonable steps. ... One denied attempt to access the writs rooms and three letters to counsel between June of 2003 and January of 2006 simply are not enough. A reasonable person who knows that the date of decision would trigger the clock on his federal petition, and believed that he had such conflicts

> with his appointed counsel that he sought to have him removed, would have at least tried to do more than Petitioner did.

[JA 100] Thereafter, the district court granted a certificate of appealability on the question of "whether equitable tolling enlarged the one-year time period for [Petitioner] to file his 28 U.S.C. § 2254 petition." *Holland*, 539 F.3d at 1338.

The Eleventh Circuit Court of Appeals affirmed the district court. *Id.* at 1336. The court found it undisputed that Holland's federal habeas petition was filed beyond the one-year limitations period in 28 U.S.C. § 2244(d). *See id.* at 1338. The court reasoned that Holland's limitation period began running on October 1, 2001, the date on which this Court denied certiorari on Holland's direct appeal. *See id.* Eleven months and 19 days of the one-year federal limitations period then expired before Holland filed his state court motion for post-conviction relief, which tolled the remaining limitations period. *See id.* Once the Florida Supreme Court issued its mandate on December 1, 2005, Holland had 11 days remaining on his federal limitations period, but he did not file his petition in the district court until January 19, 2006 – 38 days late. *See id.*

The Eleventh Circuit, which has held that equitable tolling of AEDPA's statute of limitations may be available in truly extraordinary and rare situations, affirmed the district court's conclusion that tolling is unavailable on the facts of this case. *See Holland*, 539 F.3d at 1338 (citing *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir. 2001) ("Equitable tolling can be applied to prevent the application of [the] statutory deadline when

'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition.")). The court held that "a truly extreme case is required" under this Court's recent *Lawrence* decision. *Holland*, 539 F.3d at 1338.

As to attorney misconduct, the Eleventh Circuit affirmed the district court's conclusion that Holland failed to demonstrate extraordinary circumstances. The court concluded that Collins's failure to meet the filing deadline was negligent (perhaps grossly negligent) and a failure to meet "a lawyer's standard of care," but that such misconduct falls short of the type of egregious attorney misconduct necessary to claim equitable tolling. *Id.* at 1339; [JA 110]. Notably, Holland made no allegations of factual misrepresentations or lies by Collins. *See Holland*, 539 F.3d at 1339. The allegations only involved communications between Holland and Collins, disagreements over issues to be raised, an alleged failure to update Holland on the status of his case, and a mistake regarding the applicable law. Holland could therefore, at most, establish "mere" professional negligence, which is insufficient to toll the statute of limitations. *Id.* (citing *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008)). The court reasoned that "no allegation of lawyer negligence or of failure to meet a lawyer's standard of care – in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment and so forth on the lawyer's part – can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling." *Id.* The court summarized its holding, stating: "Pure professional negligence is not enough. This case is a pure professional negligence case." *Id.*

In addition, the Eleventh Circuit rejected Holland's contention that the Florida Supreme Court's alleged failure to oversee Collins was a basis for relief. [JA 110-11 (citing *Lawrence*)] The court also rejected Holland's contentions that the Florida Supreme Court failed to notify him about the issuance of the mandate in his case and that the Department of Corrections alleged denial of access to the "writs room" supported relief. The court noted that Holland sent his letter to the Florida Supreme Court on December 15, 2005 (nine days *after* the deadline for his federal habeas petition), and that the alleged denial of access occurred on January 9, 2006 (28 days *after* the deadline for his federal habeas petition). Even assuming Holland's two allegations were true, the court held that both occurred *after* the filing deadline and could not have prevented him from filing a timely petition. [JA 110-111] The court also rejected the contention that the district court erred by not holding an evidentiary hearing, noting that circuit precedent leaves this decision to the "sound discretion of the district court." [JA 111]

Holland filed a petition for writ of certiorari in this Court, which was granted on October 13, 2009.

## SUMMARY OF ARGUMENT

The Eleventh Circuit was correct in denying equitable tolling of the limitations period established in AEDPA based on the alleged "gross negligence" of Holland's counsel.

As an initial matter, equitable tolling conflicts with AEDPA, which provides specific instances in which delays are recognized or tolling of the one-year statute of limitations is permitted, *see* 28 U.S.C. §§ 2244(d)(1) & (d)(2), thereby overcoming a presumption favoring such tolling. Given AEDPA's purpose of establishing deadlines that promote the finality of criminal judgments, as well as the statute's structure, Congress could not have intended the application of equitable tolling. Moreover, no statutory ground exists under AEDPA to toll the one-year limitations period for the incompetence or ineffective conduct of petitioner's post-conviction counsel. Had Congress so intended, such an exemption could have been set forth in AEDPA; it was not. Instead, Congress stated that the incompetence or ineffectiveness of post-conviction counsel provides no basis for relief in the federal forum, *see* 28 U.S.C. § 2254(i), thereby implicitly buttressing the point that post-conviction counsel's conduct should not form the basis for the extra-statutory relief sought in this case. Read as a whole, AEDPA reflects Congress's intent that the Act's one-year limitations period should not be tolled for reasons beyond those set forth in the statute.

Even if this Court assumes or decides that equitable tolling exists under AEDPA, the Eleventh Circuit was correct in denying relief on the facts presented. Because only extraordinary and rare

circumstances, not attributable to the petitioner or his attorney, justify the application of equitable tolling, the standard for such relief must be exceptionally high. All errors of a litigant's post-conviction counsel are attributable to the litigant. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). No meaningful difference exists between an attorney who fails to understand the law and, as a consequence, files an untimely petition, and an attorney who fails to file the petition despite his client's directions. The record here establishes that the failure to timely file a habeas petition was due to Holland's attorney, who misapprehended the applicable law, a ground that does not warrant equitable relief under *Lawrence*.

To open the door to attorney "gross negligence" or "dishonesty" as grounds for equitable tolling is inconsistent with *Lawrence* and *Coleman* and unworkable in practice. Courts would have to conduct evidentiary hearings to determine whether an attorney was "dishonest" or committed a sufficiently egregious act of incompetence in filing an untimely habeas petition. Attempts to define what degree of dishonesty or incompetence that justifies relief will lead to more litigation and more delays, particularly in capital cases. Litigants such as Holland, who the district court found was uncooperative and non-responsive and who filed an unfounded bar complaint against his attorney, will have a vehicle for pursuing unjustified relief by characterizing their post-conviction counsel as dishonest or incompetent. Allowing equitable tolling under these circumstances undermines the intent of Congress as well as the states' interests in finality of judgments and the administration of their criminal justice systems. The purpose of AEDPA's statute of limitations is to provide finality for capital convictions; allowing extra-

statutory judicial tolling based on discretionary equitable principles puts this core purpose in jeopardy.

For these reasons, this Court should hold that equitable tolling is unavailable under AEDPA, or alternatively that equitable tolling based on attorney incompetence or ineffectiveness is unavailable. If the Court determines or assumes that equitable tolling exists under AEDPA, it should affirm the decision of the Eleventh Circuit that equitable tolling is unavailable based on the alleged "gross negligence" of the attorney at issue in this case. In doing so, the Court should refrain from adopting the entirety of the Eleventh Circuit's standard, which allows for equitable tolling based on allegations of attorney bad faith, dishonesty, divided loyalty, and the like. Such a standard is unmanageable in practice and creates incentives to characterize disagreements with post-conviction counsel's actions as "dishonest" or "deceitful" conduct warranting equitable relief, thereby thwarting AEDPA's limited tolling provisions and this Court's decision in *Lawrence*.

## ARGUMENT

Holland filed his habeas petition, pursuant to 28 U.S.C. § 2254, 38 days after the one-year statute of limitations expired. In rejecting the out-of-time petition, the Eleventh Circuit held that attorney negligence, even gross negligence, is not a basis for equitable tolling. Instead, absent "allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part," equitable tolling is not allowed. *Holland*, 539 F.3d at 1339. Holland asserts he is entitled to equitable tolling of the statute of limitations under section 2244(d)(1)(B) based on his counsel's negligence in missing this statutory deadline. Holland's claims should be rejected because (a) equitable tolling is inconsistent with AEDPA; and (b) even if equitable tolling is available, the attorney conduct at issue does not meet the extraordinarily high standard required for such relief.

### I. Equitable Tolling Is Unavailable Under AEDPA.

The issue of whether AEDPA allows for equitable tolling has eluded this Court's resolution. *See Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (assuming, without deciding, that equitable tolling applies); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005) (availability of equitable tolling is an open question). But it is fairly considered a part of the Question Presented, which assumes the existence of equitable tolling. As discussed below in subsection (A), equitable tolling does not apply based on the purpose and statutory structure of AEDPA, which overcomes the presumption that such tolling exists for non-jurisdictional statutes of limitations. Alternatively, as

discussed below in subsection (B), equitable tolling does not apply for attorney misconduct amounting to ineffective assistance of counsel.

### A. Equitable tolling is inconsistent with AEDPA's purpose and structure.

Nearly 20 years ago in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990), an action involving a belated filing of an employment discrimination action against the government, this Court explained that while a presumption of equitable tolling exists in suits against the government, the presumption can be overcome by Congress. An underlying question in this case is whether this presumption in favor of equitable tolling is rebutted by the purpose and statutory structure of AEDPA. This purpose and structure must be considered in light of the principles in this Court's precedents holding that the presumption in favor of equitable tolling can be rebutted where such tolling would be inconsistent with the terms of the relevant statute. *See, e.g., Young v. United States*, 535 U.S. 43, 49 (2002); *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *United States v. Brockamp*, 519 U.S. 347 (1997).

A clear and consistently-cited purpose of AEDPA is the reduction of delays and abuses in federal habeas proceedings via the establishment of a detailed statute of limitations that accounts for those situations in which Congress deemed extensions of time permissible. Congress was concerned about the delay caused by habeas petitions, and sought to shorten the time between sentencing and execution. *See* H.R. Conf. Rep. No. 104-518, at 111 (1996) ("This

title incorporates reforms to curb the abuse of the statutory writ of habeas corpus and to address the acute problems of unnecessary delay and abuse in capital cases."); *see also* 142 Cong. Rec. S3376 (Apr. 16, 1996) (remarks of Senator Slade Gorton that delay has "caused the people of the United States to lose an important degree of faith in their criminal justice system."); Cong. Rec. S5805 (Apr. 27, 1995) (remarks of Sen. Bob Dole that new bill was meant to prevent violent criminals from "gaming the system" by purposefully causing unwarranted delay).[11]

This Court has stressed that the habeas statute of limitations was meant to end delays in capital cases. *See, e.g., Baze v. Rees*, 128 S. Ct. 1520, 1542 (2008) (noting AEDPA was designed to address the problem of "seemingly endless proceedings that have characterized capital litigation" (citing H.R. Rep. No. 104-23, p. 8 (1995) (stating that AEDPA was "designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases")); *see also Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (stating that "Congress enacted AEDPA to reduce

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[11] Early in the legislative debates, a letter from several state attorneys general was read into the record, noting that capital sentences are subject to endless legal obstacles, undermining the credibility of those sanctions. 141 Cong. Rec. S7480 (May 25, 1995). The National Association of Attorneys General also sent a letter, signed by 34 state attorneys general, supporting the bill, and the National Association of District Attorneys supported the bill as well. *See* 142 Cong. Rec. H3611 (Apr. 18, 1996) (statement of Rep. Hyde). The delays can be substantial. *See, e.g., Johnson v. Bresden*, No. 09-7839 (December 2, 2009) (denial of certiorari in a capital case spanning 29 years in which petitioner asserted that such a "lengthy and inhumane delay" violates the Eighth Amendment).

delays in the execution of state and federal criminal sentences, particularly in capital cases"); *Day v. McDonough*, 547 U.S. 198, 208 (2006). Ending delay is critical because the states have a "strong interest in preserving the finality" of their criminal judgments. *Henderson v. Kibbe*, 431 U.S. 145, 154 n.13 (1977).

Given this purpose, Congress structured federal habeas proceedings in a thoughtful way that provides for appropriate exceptions for delays in the filing of such petitions and for circumstances when tolling of such proceedings is permissible. For example, section 2244(d) provides that the statute of limitations will not begin to run until the facts upon which claims are based could have been discovered through due diligence, or until a new retroactive constitutional right that forms the basis for a claim is recognized. *See* 28 U.S.C. § 2244(d)(1)(C) & (D). In addition, the limitations period does not begin to run until a state-created illegal impediment to filing is removed. *See id.* § 2244(d)(1)(B). Section 2244(d) also provides that the time during which a defendant is actually seeking to exhaust his claims in state court is not counted toward the statute of limitations, as occurred in Holland's case, thereby providing a specific basis for statutory tolling. *See id.* § 2244(d)(2).

Given AEDPA's comprehensive legislative structure, these specific limitations on the situations involving delays and tolling that Congress deemed appropriate should be read as limiting the situations where relief was intended. *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981) ("The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs."). Had Congress intended a

greater scope of circumstances justifying delays or tolling, it certainly could have said so, but did not.[12] *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). In determining the scope and meaning of AEDPA's language, this Court should not infer or create exceptions that add to those that Congress has specified. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 n.30 (1994) ("We are not free to fashion remedies that Congress has specifically chosen not to extend."). Even where "equitable considerations strongly support[] a nonliteral reading of the statutory provisions regarding the time during which a claim could be asserted[,]" this Court has refrained from altering the statutory structure that Congress enacted. *See Nw. Airlines,* 451 U.S. at 97-98 ("favorable reaction to the equitable considerations" of a petitioner's claim "is not a sufficient reason for enlarging on the remedial provisions contained in these carefully considered statutes."). Similarly, while the Court has the authority to construe statutes, this authority "is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Id.* at 97. Based on these principles, the list of exceptions that Congress has specified in AEDPA should be read narrowly, and not expanded in a way that thwarts its intent that delays be avoided and tolling limited.

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[12] That Congress did not include a tolling provision for the ineffectiveness or incompetence of post-conviction counsel, and, instead, affirmatively said such conduct "shall not be a grounds for relief" in section 2254 proceedings, is a strong indicator that no such "relief" was intended. *See* section I(B) below.

AEDPA's statutory structure reflects that Congress intended that other causes of delay should be charged against the defendant. The "most natural reading" of AEDPA indicates that Congress intended to exclude open-ended judicial tolling from the statute by including specific provisions for delays and tolling. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001); *Brockamp*, 519 U.S. at 352. Given AEDPA's statutory limitations, the additional grant of equitable tolling would be inconsistent with the text and purpose of the statute. *See Young*, 535 U.S. at 49; *Beggerly*, 524 U.S. at 48; *Brockamp*, 519 U.S. at 347.

This conclusion is consistent with *Beggerly*, which held that equitable tolling was inconsistent with the terms of a statute of limitations when the statute already provided that it would not start to run until the litigant knew or should have known of the claim. *See Beggerly*, 524 U.S. at 48 (ruling that statute already "effectively allowed for equitable tolling" on this specified ground; when combined with a generous 12-year limitations period, extension of the period through equitable tolling would be unwarranted); *see also Honda v. Clark*, 386 U.S. 484, 501 (1967) (reasoning that whether a statute allows for equitable tolling should be determined by asking whether such tolling would be "consistent with the overall congressional purpose" for the statute).[13]

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[13] This rule also follows directly from the cannon of statutory construction *"expressio unius est exclusio alterius."* *TRW, Inc.*, 534 U.S. at 28; *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988). This rule of construction is the default rule when Congress designates a specified conduction or event, such as the tolling provisions of section 2244(d). This means that the absence of equitable tolling in a statute that otherwise contains detailed (Continued . . .)

Allowing equitable tolling similarly undermines the plain text and purpose of AEDPA. Federal courts of appeals, however, have been invoking equitable principles in instances that fall more appropriately within the ambit of AEDPA's statutory tolling provisions. *See, e.g., Hollinger v. Sec'y, Dep't of Corrs.*, 2009 WL 1833746, at *4 (11th Cir. 2009) (finding extraordinary circumstances sufficient to trigger equitable tolling due to state trial court's admitted failure to notify petitioner of denial of his postconviction motion); *Spotsville v. Terry*, 476 F.3d 1241, 1245 (11th Cir. 2007) (permitting equitable tolling due to petitioner's reliance on wrong instructions from court).

As an example, lower courts have considered the application of equitable tolling in claims of actual innocence. However, this Court has held that for a claim of actual innocence "[t]o be credible," it has to be supported with "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence – that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Because a claim of actual innocence must be based on new evidence, and the statute of limitations does not begin to run under section 2244(d)(1)(D) until the evidence in support of the claim was known or could have been known through an exercise of due diligence, it is inconsistent with the terms of the statute to grant equitable tolling based on a claim of actual innocence. Allowing

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tolling provisions indicates that the legislature did not intend any additional tolling. *See Brockamp*, 519 U.S. at 352 (reasoning that the statute's detailed list of exceptions "indicate[s] to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote.").

equitable tolling on grounds that overlap with the specific deadlines in section 2244(d)(1)(A) is inconsistent with decisions on the start and "re-start" dates that Congress has already set; petitioners either qualify for a delayed starting date under the statute or they do not.

Here, as in *Beggerly*, the general presumption is rebutted by evidence that Congress would not want equitable tolling to apply. *See Beggerly*, 524 U.S. at 49 (refusing to apply the general presumption in favor of equitable tolling to the Quiet Title Act in light of the "special importance" of repose in the area of real property rights). The great importance of finality of judgments in the area of state criminal convictions, and the intent of Congress to reduce delays via a detailed statute of limitations, rebuts the general presumption.

This conclusion is particularly appropriate because federal habeas litigation is so peculiarly governmental (rather than private party litigation), that the basis for the presumption is not apparent. *See also Brockamp*, 519 U.S. at 347 (explaining that for *Irwin*'s general presumption to apply, the underlying cause of action must be "sufficiently similar" to a traditional cause of action between private parties); *compare Young*, 535 U.S. at 49 (applying general presumption in favor of equitable tolling to a provision of the Bankruptcy Code, observing that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with text of relevant statute). Habeas litigation is dissimilar from a traditional cause of action between private parties; it is a unique cause of

action resulting in the overturning of a criminal conviction.[14]

Moreover, in interpreting statutes of limitations, this Court has consistently looked at the burden equitable tolling would have on government operations. In the case of section 2244(d), allowing equitable tolling would require states to have "side litigation" in far too many cases each year, further draining state resources. *See Brockamp*, 519 U.S. at 352-53. For example, allowing contests over attorney misconduct would significantly lengthen the habeas process via additional hearings, appeals, and certiorari petitions to this Court. Simply put, judicial exceptions to AEDPA's statute of limitations would inappropriately expose final state criminal judgments to prolonged jeopardy.[15]

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[14] The brief of amici Legal Historians essentially argues that since the writ of habeas corpus has historical underpinnings in the courts, it must be subject to equitable principles such as judicial tolling. This Court's decision in *Felker v. Turpin*, 518 U.S. 651 (1996), however, demonstrates that habeas jurisdiction in the lower federal courts is historically a creature of *statute*, and that Congress can establish requirements and limitations on relief as well as "gatekeeping" provisions. AEDPA's one-year limitations period, enacted in the interests of federalism, comity and finality, does just that. As discussed herein, these principles are violated when federal courts allow discretionary tolling in circumstances beyond those Congress has specified. *See id.* at 663-64 (reasoning that restrictions on the writ provided by Congress are not unconstitutional suspensions of the writ in violation of Article I, Section 9 of the Constitution, but can be enacted to prevent abuses of the writ).

[15] As this Court has noted, the primary focus of AEDPA is on capital cases, *see Woodford v. Garceau*, 538 U.S. 202, 206 (2003), though its limitations extend to non-capital petitioners, who may lack the incentives of capital petitioners to delay resolution of their cases.

Equitable tolling is fruitful as a delay strategy in part because the chances of success on the merits in federal habeas review are low. Habeas relief is an "extraordinary remedy" limited to correcting those "grievously wronged." *See Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993); *Burris v. Parke*, 95 F.3d 465, 471 n.1 (7th Cir. 1996) (Manion, J., concurring) ("Delay is the name of the game in death penalty cases."). In fact, defendants can put the brakes on collateral review for substantial periods of time simply by making conclusory allegations and obtaining an evidentiary hearing as to entitlement to equitable tolling, and then appealing. Delays create unique harms in capital cases by damaging the states' implementation of their criminal justice systems and creating uncertainty as to the finality of criminal judgments, results that are clearly at odds with the purpose of AEDPA.

For all these reasons, equitable tolling is inconsistent with the purpose and structure of AEDPA's statute of limitations and its exceptions. Congress has specified the parameters it deems appropriate for delays or tolling in the context of federal habeas litigation, thereby rebutting the presumption that equitable tolling is available.

### B. Equitable tolling based on ineffective or incompetent post-conviction counsel is unavailable.

Even if equitable tolling were consistent with the purpose and structure of AEDPA's statute of limitations, claims based on ineffective or incompetent attorney conduct should not be cognizable as grounds for such relief. When it enacted AEDPA, Congress

added section 2254(i), which states that the "ineffectiveness or incompetency of counsel during Federal or State collateral post-conviction shall not be a ground for relief in a proceeding arising under section 2254." Because habeas jurisdiction is limited to constitutional defects in the conviction and sentence, *see Engle v. Issac*, 456 U.S. 107, 119 (1982), and is not available for defects in collateral proceedings, *see Quince v. Crosby*, 360 F.3d 1259, 1262-63 (11th Cir. 2004), this statutory language evidences a clear legislative intent that allegations of ineffective assistance of post-conviction counsel during the state and federal collateral post-conviction processes are not cognizable in federal post-conviction proceedings to avoid procedural defaults.

By logical extension, section 2254(i) inferentially bars petitioners in federal habeas proceedings from using "ineffectiveness or incompetency" by their collateral post-conviction counsel to justify equitable tolling, which is a form of "relief" from the bar of AEDPA's statute of limitations. Logically, Congress would not have intended to deny relief based on ineffective or incompetent assistance of post-conviction counsel in advancing a petitioner's constitutional claims, and yet allow ineffective or incompetent assistance to be the basis for extending the deadline to raise those claims. While the Eleventh Circuit properly denied equitable tolling and should be affirmed on that basis, its implication that tolling could be permitted based on attorney conduct should be rejected in light of section 2254(i).

The ACLU's amicus brief contends that section 2254(i) is "entirely irrelevant" because it only denies federal courts a "ground" for awarding habeas "relief"

on the merits. ACLU Br. at 21-22. "Relief" as used in the statute, however, can be easily read to mean *any* relief, including equitable tolling and procedural default. *See, e.g., Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005); *Post v. Bradshaw*, 422 F.3d 419, 423 (6th Cir. 2005) (concluding that § 2254(i) precluded granting a 60(b) motion based on habeas counsel failure to pursue discovery because the statute bars "relief," not simply particular kinds of relief, such as a granting writ of habeas corpus, and noting that section 2254 "is expansive in its prohibition."). Given AEDPA's structure and purpose, this statutory language strengthens the conclusion that any relief, not just ultimate relief on the merits of habeas claims, was intended, including equitable tolling based on ineffective or incompetent attorney conduct.

Section 2254(i) essentially codified the principle that attorney negligence does not excuse a procedural default. The point of this Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), is that because no constitutional right to post-conviction counsel exists, even if post-conviction counsel is ineffective, the claims are barred from federal habeas review. *See also Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (stating that attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel, and citing *Coleman*, 501 U.S. at 756-57).

In *Coleman*, this Court held that the attorney's failure to file a notice of appeal in collateral proceedings, where no constitutional right to post-conviction counsel exists, did not constitute cause to excuse the procedural default. *See Coleman*, 501 U.S. at 756-57. Coleman's state habeas counsel filed a

notice of appeal in the Virginia Supreme Court three days late, and the Virginia Supreme Court dismissed the appeal as untimely. Coleman then filed a federal habeas petition, but the district court found several of the claims to be procedurally barred because the claims had been dismissed by the Virginia Supreme Court. Coleman asserted that his attorney's ineffectiveness in missing the deadline should excuse his procedural default.

This Court in *Coleman* noted that because no constitutional right to an attorney exists in state post-conviction proceedings, Coleman was required to bear the risk of his attorney missing the deadline. *See Coleman*, 501 U.S. at 753. The Court reasoned that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.' " *Id.* (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990)). This Court specifically rejected Coleman's assertion that a post-conviction attorney's error can be "so bad that the lawyer ceases to be an agent of the petitioner." *Coleman*, 501 U.S. at 754 (citation omitted). This assertion "would be contrary to well-settled principles of agency law." *Id.* The Court held that "the gravity of the attorney's error" did not matter, concluding that in "the absence of a constitutional violation, the *petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation*." *Id.* (emphasis added). Similar to *Coleman*, Holland wants to use the ineffectiveness of his collateral counsel in missing a deadline as an excuse to allow the federal court to hear the merits of his federal habeas petition. Holland's situation is closely analogous to the type of

attorney error upon which this Court denied relief in *Coleman*.

Indeed, it would be an odd result that a petitioner has no constitutional right to effective or competent post-conviction counsel on the *merits* of his claims, yet the alleged ineffectiveness or incompetence of post-conviction counsel can justify the extraordinary step of overriding the statutory limitations period and allow claims that are time-barred under AEDPA. Likewise, because a failure to comply with a limitations period in state court bars relief, it would be odd that the same conduct in federal court would not bar relief. *See Coleman*, 501 U.S. at 722 (rejecting claim of ineffective assistance based on failing to file a timely notice of appeal). The principle that applied in *Coleman*, that a habeas petitioner bears the risk of "*all attorney errors made in the course of the representation*" applies with equal force in this case. *Id.* at 754 (emphasis added).[16]

In summary, AEDPA's language in section 2254(i) – buttressed by the purpose and structure of

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[16] *See also Williams v. Taylor*, 529 U.S. 420, 436 (2000) (citing *Coleman*, noting it has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."); *Johnson v. McBride*, 381 F.3d 587, 590 (7th Cir. 2004) (citing § 2254(i) and *Coleman* to conclude that attorney conduct is not a basis for equitable tolling in capital case); *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) ("attorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client") (citation omitted); *Davis v. Sec'y, Dep't of Corrs.*, 2009 WL 4349709 (M.D. Fla. 2009) (denying equitable tolling because petitioner did not show circumstances beyond his control in unreasonably allowing 294 days to lapse before filing his state proceedings).

AEDPA's statute of limitations – is consistent with the principles of *Coleman*, and supports the conclusion that equitable tolling based on ineffective or incompetent attorney conduct is inconsistent with the terms of AEDPA's statute of limitations.

## II. Even if Equitable Tolling Exists (Or Is Assumed to Exist) Under AEDPA, It Does Not Extend to the Attorney Conduct Below.

Even if some form of equitable tolling exists (or is assumed to exist) under AEDPA, those circumstances should be exceedingly rare and should not extend to (a) circumstances within a litigant's control; or (b) disagreements between attorney and client or mistakes concerning the applicable law, both of which form the essential core of this case. The circumstances below do not meet the heavy burden that petitioners in nearly every circuit[17] must

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[17] *See, e.g., United States v. Pollard*, 416 F.3d 48, 56 (D.C. Cir. 2005) (assuming equitable tolling exists, petitioner not entitled to it due to lack of "extraordinary circumstances" beyond his control; petitioner had to show unethical and outrageous behavior by opposing counsel); *Neverson v. Farquharson*, 366 F.3d 32, 42 (1st Cir. 2004) (non-capital case; equitable tolling should be used sparingly, in extraordinary circumstances, and "at a minimum, ... is appropriate only when circumstances beyond the petitioner's control have prevented him from filing on time"); *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (capital case; equitable tolling "must be reserved for those rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitation period against the party and gross injustice would result") (affirming dismissal of petition where untimely filing resulted from counsel's gross negligence and unprofessional conduct in misinterpreting timing requirements); *Fierro v. Cockrell*, 294 F.3d 674, 681, 684 (5th Cir. 2002) (capital case; petitioner's (Continued ...)

demonstrate to establish the type of "extraordinary circumstances" that prevent a petitioner from asserting his or her rights. Excusable neglect and mistakes by the prisoner's attorney are deemed, often

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mistaken assumption was not a sufficient exceptional circumstance to warrant equitable tolling; equitable tolling not justified either by a lack of notice of AEDPA's requirements or insufficient access to law library); *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (non-capital case; petitioner not entitled to equitable tolling based on claim of insufficient access to relevant law; relief would be appropriate if petitioner could show (1) actual innocence; (2) adversary's conduct or uncontrollable circumstance prevented him from timely filing; or (3) prisoner actively pursued judicial remedies but filed a defective pleading); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (capital case; counsel's confusion about applicable statute of limitations did not warrant equitable tolling); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (non-capital case; petitioner could not show "extraordinary circumstances prevented him from filing his petition on time" or that he "acted with reasonable diligence" when the untimely filing was due to his attorney's miscalculation of time); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (non-capital case; equitable tolling exists under AEDPA, but AEDPA's already built-in tolling provisions make it "unclear what room remains for importing the judge-made doctrine of equitable tolling"; attorney's mistake is clearly insufficient); *see also Spitsyn v. Moore*, 345 F.3d 796, 799, 801 (9th Cir. 2003) (capital case; court applied "high" threshold requirement for equitable tolling, citing examples of situations where intervening actions of court or prison official interferes with a prisoner's otherwise timely filing; court determined that attorney misconduct at issue sufficiently egregious that equitable tolling applied). Only two federal circuits have rejected the extraordinary circumstances analysis in favor of an arguably less burdensome standards. *See Dunlap v. United States*, 250 F.3d 1001, 1009 (6th Cir. 2001); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001).

explicitly, insufficient to overcome the high threshold in these cases.[18]

### A. The Standard: Equitable tolling extends only to circumstances beyond a litigant's control.

Equitable tolling is unavailable to Holland because the failure to file a timely federal habeas petition was not due to some extraordinary circumstance beyond his and his attorney's control. A "litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently,[19] and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also Sandvik v. United States*, 177 F.3d 1269, 1271 (11th

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[18] *Trapp v. Spencer*, 479 F.3d 53, 60 (1st. Cir. 2004) ("mistake by counsel ... does not constitute extraordinary circumstances warranting equitable tolling."); *Doe v. Menefee*, 391 F.3d 147, 175 (2d Cir. 2004) (attorney incompetence, on its own, is not sufficient to trigger equitable tolling, as petitioner must also demonstrate own reasonable diligence); *Spitsyn*, 345 F.3d at 801 (equitable tolling requires more than mere negligence to apply); *Rouse*, 339 F.3d at 246, 248; *United States v. Martin*, 408 F.3d 1089, 1093-95 (8th Cir. 2005) (equitable tolling appropriate where attorney deceived petitioner); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (same).

[19] This case focuses on the second factor. The district court's finding that Holland did not meet the first factor of diligence [JA 90-92] was not addressed in the Eleventh Circuit's decision and is not within the Question Presented, which is limited solely to whether the "gross negligence" of Holland's counsel is an extraordinary circumstance warranting equitable tolling. Holland addresses his own diligence in his merits brief [Br. 59-62], and to the extent the Court considers the matter, Respondent relies on the findings of the district court below.

Cir. 1999); *Drew v. Dep't of Corrs.*, 297 F.3d 1278, 1287 (11th Cir. 2002).

As sufficient "cause" to excuse a procedural default, this Court has required a showing that some factor external to the litigant resulted in noncompliance with the procedural requirements of habeas law. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Mistakes or negligence by a litigant's attorney, his agent, are grounded in circumstances under a litigant's control and do not qualify. As stated in *Coleman*, error by post-conviction counsel is not "cause" and cannot form the basis for relief. In effect, conduct of a litigant's attorney amounts to action of the litigant's agent and thereby cannot meet the standards for equitable tolling. *See also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990); *Coleman*, 501 U.S. at 752-57; *see also Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (capital defendants have no constitutional right to appointed counsel in post-conviction proceedings); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (same as to non-capital defendants).

This conclusion is consistent with the principle that equitable tolling is a rare remedy that is "not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007). At the very least, it must be limited to rare and exceptional circumstances. *See Irwin*, 498 U.S. at 96 (recognizing equitable tolling allowed in situations where petitioner has been induced or tricked into missing filing deadline by opposing party's misconduct); *Lawrence*, 549 U.S. at 335-36; *Coleman*, 501 U.S. at 752-753. As discussed above, however, AEDPA already provides *statutory* grounds for extraordinary circumstances that delay or toll the start date of the

limitations period, making equitable tolling an impermissible or very limited basis for relief. In fact, this Court in *Irwin* discussed misconduct by the opposing party as an available ground for equitable tolling, a ground specifically listed in 28 U.S.C. § 2244(d)(1)(B). This demonstrates that Congress has already considered necessary reasons to delay or toll the AEDPA limitations period, making extra-statutory tolling inconsistent with the Act.

This Court should reject any standard of tolling based on circumstances within the petitioner or his agent's control. On this basis alone, the acts of Collins, as Holland's agent, and those of Holland himself, do not form the basis for equitable relief as the next section discusses.

### B. The Eleventh Circuit correctly held that equitable tolling does not apply in this case.

Given this Court's precedents, the Eleventh Circuit correctly held that nothing occurring during Holland's attorney-client relationship with Collins rose to the extraordinary level that would justify equitable tolling. The court correctly held that Holland raised merely a professional negligence claim that forms no basis for relief.

The facts demonstrate that this case is little different from *Lawrence*. During the period in which state post-conviction proceedings were pursued (and AEDPA's statute of limitations was tolled), the sum and substance of Holland's communications with his attorney amounted to a disagreement with the direction and objectives of the litigation and an apparent misunderstanding of applicable law.

Holland tried to convince Collins to raise claims that Collins did not think should be raised in state court, complaining to whoever would listen and undertaking *pro se* filings in state court when Collins would not raise those claims. These facts, as described by the district court and relied upon by the Eleventh Circuit, provide no basis to justify tolling the limitations period.

In September 2002, Collins filed a state post-conviction motion, which was near the end of the one-year AEDPA limitations period, leaving little remaining time for the filing of a possible federal post-conviction. From that point in 2002 through the issuance of the Florida Supreme Court's decision and mandate in 2005, Collins communicated with Holland about the litigation regularly, as the district court clearly demonstrated in its order and as mentioned in Holland's brief. [JA 57-61, 63-64; Br. 5-10] Fairly read in context, the communications between Holland and Collins during this time period (i.e., while the state post-conviction proceedings were pending in the state trial and appellate courts) amounted to a disagreement over the issues to be raised in the state habeas proceedings. Holland attempted on several occasions to "supplement" the documents filed by Collins with additional issues, which was improper given that he was represented by counsel. [JA 9, 14, 17]

For example, on appeal to the Florida Supreme Court, Holland continued to disagree with Collins over the substantive issues to be presented in his case and attempted to raise additional issues in the Florida Supreme Court, despite Collins's continued representation. [JA 24, 207] Collins filed the state post-conviction documents in the Florida Supreme

Court on January 9, 2004, and Holland continued to improperly attempt to supplement the issues. [JA 30, 31, 35] He also complained to The Florida Bar, asserting that Collins failed to raise issues in his case, a complaint the Bar found "did not rise to the standard of a violation" bar rules. [JA 92 n.9]

Notably, on January 31, 2006, Collins sent a letter to Holland explaining why Holland's federal habeas petition was untimely. [JA 78-80] Collins believed that AEDPA's one-year limitation began to run on October 5, 2000, when the Florida Supreme Court affirmed Holland's death sentence on direct review. Because Collins was appointed in November 2001, more than a year after Holland's case became final, he implied that filing a federal habeas petition would be untimely absent equitable tolling. [JA 78-79] His explanation was erroneous.[20] *See, e.g., Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari

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[20] The record does not reflect the precise basis for Collins's misunderstanding, which could have been based on a number factors including uncertainty as to Florida's possible status as an opt-in state under Chapter 154 subject to the strictures of 28 U.S.C. §§ 2261-2266. *See Kelley v. Sec'y, Dep't of Corrs.*, 377 F.3d 1317, 1340 n.26 (11th Cir. 2004) ("To the best of our knowledge, the issue of chapter 154's applicability to Florida cases *remains unresolved*.") (emphasis added) (citation omitted); *see generally* 28 U.S.C. §§ 2261 & 2265 (opt-in to special habeas procedures in capital cases where state has certified mechanism for "appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post conviction proceedings brought by indigent prisoners who have been sentenced to death."). Whatever the reason, his mistake does not support equitable tolling.

petition expires."). As the district court and the Eleventh Circuit both held, however, this misunderstanding of the law of when the one-year limitations period under AEDPA began to run does not justify relief under *Lawrence*. [JA 90, 110]

Holland moved to replace Collins with another attorney (whom Holland presumably thought would raise any issues Holland desired) or to proceed *pro se* if substitute counsel could not be appointed. As the district court noted, Holland had disagreements with his past lawyers, and the situation with Collins was no different. [JA 92] Holland essentially wanted to have the authority to raise claims beyond those presented by his attorney. [JA 46, 149][21]

Given this background, Holland's claim for equitable tolling reduces to a misunderstanding about the tolling period for the federal habeas petition and second-guessing of his attorney. As Holland acknowledges, Collins mistakenly believed that the tolling period under AEDPA ended before he was even appointed to represent Holland [Br. 19; JA 78-79] focuses on two letters he wrote to Collins inquiring about the status of his state appeal, both of which apparently went unanswered. [Br. 13-16] He then argues that Collins "betrayed" him by failing to file a federal habeas petition, mistakenly believing the time to file under AEDPA had already run out. [JA 78-79]

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[21] Notably, in responding to Holland's motion to replace him, Collins defended himself by stating that he did communicate with Holland during the state post-conviction proceedings and in filing briefs, raised the issues he felt could ethically be raised in good faith. [JA 38]

None of these contentions rise to the level of extraordinary attorney behavior that justifies equitable tolling. Collins was at most negligent, misconstruing the law and believing that any federal habeas petition would be late at the outset of his representation. This "garden variety" negligence by an attorney does not provide grounds for equitable tolling. *See Holland*, 539 F.3d at 1339.

Even if counsel's conduct constituted gross negligence, equitable tolling is not available. As the Eleventh Circuit held, even gross negligence is a professionalism issue that does not afford extraordinary equitable relief. *Holland*, 539 F.3d at 1339. No principled basis exists for distinguishing mere negligence from gross negligence within the context of equitable tolling. Neither category denotes conduct so far outside the range of ordinary circumstances as to be the kinds of grounds for which equitable tolling is available. *See id.* (noting that such circumstances were triggered by an attorney's knowing or reckless misrepresentations and dishonesty). As this Court has held, all degrees of negligence require "an absence of the care that was necessary under the circumstances." *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 495 (1875). Given the uncertain and malleable boundary between gross and ordinary negligence, any level of attorney negligence should remain insufficient as a basis for equitable tolling as it is outside the bright line of extraordinary circumstances.

The inadequacy of Holland's claims becomes even more pronounced when compared with the situation in *Lawrence*. In *Lawrence*, this Court rejected the claim that tolling should apply due to the uncertainty about whether the statute of limitations

was tolled during the pendency of a certiorari petition; moreover, any misunderstanding of a litigant's lawyer about AEDPA's requirements did not warrant equitable tolling. *See Lawrence*, 549 U.S. at 336-37. The reorganization of Florida's collateral system that caused confusion and delay also was deemed insufficient to constitute extraordinary circumstances justifying tolling of the statute of limitations. *Id.* at 330-31. This Court essentially rejected the same argument that Holland is making here, i.e., that he is entitled to equitable tolling because his attorney mistakenly missed the deadline or miscalculated the limitations period. *See id.* For similar reasons, Holland's claims should be rejected under the principles of *Lawrence*.

Moreover, Holland's communications (or alleged lack thereof) with Collins do not amount to the type of extraordinary circumstance that supports equitable tolling. Viewed fairly, the relationship between Holland and Collins was one in which Holland consistently second-guessed and interfered with the professional judgment of his counsel. While Holland was correct on the proper filing deadline, and his counsel mistaken, that does not amount to an extraordinary circumstance. Neither the district court nor the Eleventh Circuit were shown any evidence supporting Holland's claims in this Court that Collins intentionally betrayed his confidences by, for example, saying he filed a federal habeas petition when he did not.

To the contrary, as the district court specifically noted, it was Holland who lacked diligence by failing to take all reasonable steps once he believed that his attorney would not meet the deadline for filing a federal habeas petition. As the district court held,

when Holland's concerns about the deadline for the filing of a federal habeas petition "went unaddressed, a reasonable person in his position would have done more to protect his interest in filing a federal habeas petition." [JA 99] The court held that Holland's own evidence "shows that he was decidedly not 'in the dark' about his circumstances. Indeed, [Holland] ultimately overcame whatever reliance he had placed on his appointed counsel and filed his own habeas petition *pro se*." [JA 99] Given that Holland felt his attorney was not competent, it became incumbent upon Holland to act given "the circumstances he found himself in." [JA 99]

### C. The Eleventh Circuit's standard creates manageability problems that justify a narrower standard for equitable tolling.

While the Eleventh Circuit's decision should be affirmed, its standard for allowing equitable tolling for the acts of a litigant's post-conviction counsel, such as bad faith, dishonesty, divided loyalty, and mental impairment, is unworkable in practice and allows conduct within the post-conviction attorney's control (and perhaps the litigant's in some cases) to form the basis for relief.

For example, the Eleventh Circuit's standard creates incentives, as reflected in Holland's brief and that of its legal ethics amici, to claim dishonesty or bad faith for disagreements over litigation strategy and misunderstandings of the law, both of which do not justify relief. The degree of dishonesty that must be shown and how it is to be proven are entirely uncertain, thereby creating incentives for litigants to allege "dishonesty" in situations where they are

merely second-guessing their lawyers' decisions. Determining whether an attorney engaged in an act of dishonesty or had some "bad faith" reason for not filing a timely federal habeas petition will often be based on private interactions between a defendant and his attorney that are unrecorded and must necessarily be based on potentially unreliable testimony. In some cases, capital litigants and their counsel may have some incentive to agree that counsel did not fully inform the clients and thereby were less than honest if the effect is to extend the time for judgment and avoid finality. *See, e.g.*, Victor L. Streib, *Would You Lie to Save Your Client's Life?*, Ethics and Effectiveness in Defending Against Death, 42 Brandeis L.J. 405 (2004). In short, no reliable standard or formula exists for determining what level of bad faith, dishonesty or other types of conduct by a post-conviction attorney would merit relief. An attorney who tells his client that he will file the petition and forgets or fails to do so is not lying; he is simply engaging in professional negligence similar to the mistake of law in this case. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect."); *Wallace v. Kato*, 549 U.S. 384, 396 (2007) (observing that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.").

The mischief of a standard that includes dishonesty or bad faith is reflected where courts have found egregious attorney misconduct based on little more than missing a deadline. An example is the case of Ernest Whitfield, whose petition for certiorari is before this Court. *Whitfield v. McNeil*, Case No. 09-5776. Whitfield filed a response to the State's motion

to dismiss his petition as time barred within days of the issuance of the Eleventh Circuit's decision in *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008), which allows for tolling in cases of egregious attorney conduct. Whitfield claimed he met the *Downs* definition of "egregious attorney misconduct" because he had been shown a draft of a federal habeas petition before the statute of limitations had expired, executed an affidavit of indigence to be filed with the petition at the time, and was told that a petition would be timely filed. *See Whitfield v. McNeil*, 2008 WL 4372850, at * 4 (M.D. Fla. 2008). He also asserted that he was subsequently told the petition had been timely filed even though it was not. *Id.* at *4 n.9. The motion was supported by an affidavit from one of Whitfield's attorneys stating that she had led the defendant to believe that the petition he was shown would be timely filed when the affidavit of indigence was executed. *See Whitfield v. Sec'y, Dep't of Corrs.*, Case No. 8:07cv-1823-T-30MAP, Docket Entry 20-2 (M.D. Fla. July 11, 2008).

When the district court requested additional information regarding who told Whitfield the petition had been filed and when the communication had occurred, Whitfield provided an affidavit identifying two attorneys who had provided him this information. *See Whitfield*, Case No. 8:07cv-1823-T-30MAP, Docket Entry 25. At the evidentiary hearing in the district court, Whitfield retracted these statements. *See Whitfield*, 2008 WL 4372850, at *4 n.9. The attorney who was implicated in the affidavit testified that the habeas petition she had shown Whitfield (at the time the affidavit of indigence was filed) had only been an incomplete draft. *Id.* at *4. Moreover, both attorneys denied ever telling Whitfield that a petition had been filed. *See id.* at *4-*5. After this delay, the district

court ultimately denied equitable tolling, and the Eleventh Circuit denied relief. Petitioner now seeks review in this Court.

In the cases of Mark Asay and William Thomas (in both cases this Court denied certiorari, case numbers 09-216 and 09-234, respectively), the district court found the defendants were entitled to equitable tolling because their attorney elected to file the petitions late and testified that she had health problems. *See Asay v. McNeil*, Case No. 3:05-cv-147-J-32, Dist. Ct. Consolidated Order, Docket Entry 112, at 16, 39 (M.D. Fla. Feb. 10, 2009). This attorney provided differing versions of the cause for her delay, varying from no explanation to health problems of her husband, herself, and her mental impairment, to, finally and most offensively, her deliberate ignorance of the due date as a concerted attempt to trigger equitable tolling. *Id.* at 15, 19, 20, 23, & 37. The district court found that the attorney engaged in a pattern of egregious conduct and may have chosen to miss the deadline on purpose, and that she deceived her client by informing him that a federal petition was already untimely when it was not. *Id.* at 37. Equitable tolling was applied by the district court under these circumstances. *Id.*

As to divided loyalty and mental impairment, these standards are just as subjective and create similar incentives to characterize circumstances within the attorney's control as extraordinary ones. For instance, is the untimely filing of a petition excused due to divided loyalty because the attorney had other equally important cases she was working on? Might she be subject to accusations of bad faith for not notifying the client and/or seeking to withdraw? Or divided loyalty because she gave her

attention to one client rather than another when both needed it? What does mental impairment mean and what degree is required for relief? While some situations may involve circumstances beyond the control of the litigant and his counsel, many will not. Because the Eleventh Circuit's standard invites these types of rationalizations for the extraordinary equitable relief sought, this Court should be wary of announcing a standard that includes these potentially open-ended concepts.

In summary, attempting to separate the forms of attorney conduct that are sufficiently egregious and beyond the control of both the attorney and client from those that are not presents manageability problems that, as the Eleventh Circuit feared, might allow the exceptions to swallow the rule. [JA 110 (citing maxim that "[e]very exception not watched tends to take the place of the rule.")] The unintended consequence of including attorney conduct such as dishonesty in the list of extraordinary conduct justifying relief is that litigants and their counsel have an incentive to frame their allegations to this standard, even where supporting evidence of truly dishonest (versus negligent, ineffective, or incompetent) conduct is lacking. The result is that evidentiary hearings are often ordered, further delaying the proceedings in cases nationwide, resulting in unnecessary delays that Congress intended to avoid. This result does not serve the goals of federalism and comity that underlie AEDPA, and justifies carefully limiting the scope of the circumstances that warrant equitable tolling, if it is to be allowed at all.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Eleventh Circuit Court of Appeals.

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# REPLY BRIEF

No. 09-5327

In The

# Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner,*

vs.

STATE OF FLORIDA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITIONER'S REPLY BRIEF ON THE MERITS

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## ARGUMENT

### A. Equitable Tolling Is Available Under the AEDPA.

Respondent's arguments – which it raises for the first time in this Court[1] – about why equitable tolling is never available under the Antiterrorism and Effective Death Penalty Act (AEDPA) are easily answered.

First, despite acknowledging that 28 U.S.C. §2244(d) is not a jurisdictional provision but instead sets out a statute of limitations, and ignoring the fact that eleven circuits have held that equitable tolling is available under the AEDPA, Respondent contends that equitable tolling "conflicts with AEDPA" because §2244(d) provides for specific instances where the

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[1] The availability of equitable tolling under the AEDPA was not a disputed issue at all in the courts below. *Cf. Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (noting that Petitioner and the State of Florida "agree that equitable tolling is available"). In the district court, Respondent's position was that equitable tolling of AEDPA's statute of limitations was available as "'an extraordinary remedy which is typically applied sparingly.'" DE41 at 5 (quoting *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000)), and could be established by showing: (1) that Holland had been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. DE41 at 5 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The district court assumed that equitable tolling was available based on Eleventh Circuit precedent, J.A. 84-85, and the Eleventh Circuit both assumed equitable tolling was available and concluded that Holland's federal habeas petition "may still be considered timely if he is entitled to equitable tolling." J.A. 107.

statute of limitations will not "begin to run" (Brief of Resp. at 19, 25) (citing 28 U.S.C. §§2244(d)(1)(B)-(D); (d)(2)). In Respondent's view, this statutory structure "should be read as limiting the situations where relief was intended." (Brief of Resp. at 25). This argument

> reads too much into any negative inference that may reasonably be drawn from the exceptions. The exceptions in §2244(d)(1)(B)-(D) simply make the writ available to address later arising circumstances, while the exception in §2244(d)(2) ensures that state post-conviction review will be allowed to proceed on course. Without these exceptions, a petitioner could inappropriately be denied the writ altogether, "risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). The inclusion of these statutory provisions does not give rise to the inference that the application of the limitation period must otherwise be absolute, as might be the case if the period were jurisdictional. We therefore conclude that §2244(d) is subject to equitable tolling, at least in principle.

*Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000). *Harris* "is consistent with the decisions of other circuit courts that have addressed the issue." *Id.* at 330 (citing cases); *see also Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004) ("Congress's inclusion of a few specific exceptions in §2244(d)(1) does not require the inference that the limitations period is, for all other purposes, a jurisdictional bar. Given that

Congress enacted §2244(d)(1) against the backdrop of the *Irwin* [*v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990)] presumption and elected to describe the one-year term as a 'period of limitation,' the better conclusion is that Congress intended to retain the flexibility afforded by the doctrine of equitable tolling.").

Second, Respondent's contention that equitable tolling is inconsistent with Congress's purpose in enacting AEDPA, i.e., curbing delay in capital cases, is unpersuasive. Brief of Resp. at 25-26. "[T]he purpose underlying the one-year limitation period, to curb undue delays and abuse of the writ of habeas corpus, is served by a statute of limitations. Because the statute of limitations can only be [equitably] tolled in certain limited circumstances, *equitable tolling would not undermine the statute's purpose to curb undue delays and abuse.*" *Dunlap v. United States*, 250 F.3d 1001, 1006 (6th Cir. 2001) (emphasis added); *see also Miller v. New Jersey Dep't of Correctio.* , 145 F.3d 616, 618 (3d Cir. 1998) (AEDPA "provides a one year limitation period that will considerably speed up the habeas process while retaining judicial discretion to equitably toll in extraordinary circumstances."); *Calderon v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) ("Equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time.

We have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted."); *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) ("The court's judicious discretion equitably to toll [AEDPA's statute of limitations] helps safeguard habeas while still fulfilling Congress's express desire to accelerate the process.").

Third, Respondent's purported flood-gate fears are imaginary. Equitable tolling under the AEDPA *already exists nationwide*, it has been completely workable and its invocation rare and limited, and it has not led to "unfettered access to the courts," Amicus Curiae Brief of Texas et al. at 8, or "open-ended judicial tolling." Brief of Resp. at 27. Equitable tolling under the AEDPA is controlled by longstanding equitable principles which require a habeas petitioner to overcome a difficult burden, *i.e.*, establish extraordinary circumstances and diligence, and the lower courts have been underwhelmed by Petitioners' entreaties.

Finally, neither *United States v. Beggerly*, 524 U.S. 38 (1998), nor *United States v. Brockamp*, 519 U.S. 347 (1997), establish the soundness of the Respondent's interpretation of the AEDPA's statutory structure. *See* Brief of Resp. at 27, 29, 30. *Harris* is again instructive:

The State of Maryland contends that §2244(d), even if viewed as a statute of limitations, should not be subject to equitable tolling because "equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (holding that the limitation period of the Quiet Title Act is not subject to equitable tolling); *see also United States v. Brockamp*, 519 U.S. 347, 352-54 (1997) (holding that equitable tolling does not apply to the time limitations contained in §6511 of the Internal Revenue Code). The statutes at issue in *Beggerly* and *Brockamp*, however, served policy interests that would be adversely affected if the statutory limitations provisions were not strictly adhered to, a factor that is not present here, where the policy of the statute was to curb the abuse of the writ of habeas corpus, while preserving its availability. *See Calderon (Beeler) [v. United States Dist. Court for the Cent. Dist. of Cal.*, 128 F.3d 1283 (9th Cir. 1997)], 128 F.3d at 1288 n.4 ("*Brockamp* relied heavily on the fact that in administering a tax system, it is sometimes necessary 'to pay the price of occasional unfairness in individual cases . . . in order to maintain a workable regime.' While such 'occasional' injustices may be a necessary

> price of tax administration, they are decidedly not an acceptable cost of doing business in death penalty cases" (citation omitted)).

*Harris v. Hutchinson*, 209 F.3d at 329.[2]

### B. A Confluence of Factors More Than Establishes Extraordinary Circumstances and Due Diligence Warranting Equitable Tolling.

Respondent argues that if equitable tolling is theoretically available it should not be here because the "essential core of this case" involves matters either within Holland's control, or establishes a simple "disagreement" between Holland and Collins, or involves mere negligence due to counsel's misunderstanding about the statute of limitations. Brief for Resp. at 36. Respondent's depiction of this case is not based on the reality of the record.

With respect to the control Holland should have exercised, glaring in its omission from the Respondent's Brief is a discussion of its own conduct, *i.e.*, its own repeated, successful efforts striking as nullities all of Holland's motions in state court. The

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[2] The Amicus Curiae Brief of the ACLU, filed on behalf of Holland's position, provides more elaboration on this point. Holland will not repeat those arguments except to note the ACLU's argument that the statute at issue in *Beggerly* involved more of a jurisdictional prohibition rather than a statute of limitations. *See* Amicus Curiae Brief of ACLU at 26-31.

Respondent acknowledges that Holland sought to proceed *pro se* in the Florida Supreme Court if substitute counsel could not be appointed, Brief of Resp. at 43, but it ignores that it was because of the State of Florida's persistent and repeated efforts to keep Holland from even *filing paperwork in the state courts* that Holland was forced to continue with Collins' representation. Respondent affirmatively prevented Holland from obtaining a new lawyer or from representing himself. *See Lawrence*, 549 U.S. at 337 (noting that petitioner had "not alleged that the State prevented him from hiring his own lawyer or from representing himself."). Respondent fails to articulate exactly what more Holland should have done to be deemed diligent. Brief of Resp. at 46 ("Given that Holland felt his attorney was not competent, it became incumbent upon Holland to act given 'the circumstances he found himself in.'").

With respect to disagreements, Holland instructed Collins to file a federal petition in a timely manner and Collins assured Holland he would do so. There was no disagreement; Collins simply secretly did not do what he had been instructed to do.

Respondent argues that Collins' failure to file Holland's federal habeas corpus petition before the statute of limitations expired was the result of a "misunderstanding" about the tolling period. But even this alleged "misunderstanding" about the tolling period is a moving target. Respondent refers to Collins' explanation to Holland, in a letter *post-dating* the expiration of the statute of limitations, wherein

Collins "implied" that a federal habeas petition would be untimely because Collins was appointed more than a year after Holland's case became final on direct appeal. Brief of Resp. at 42.[3] Yet, earlier, Respondent offered another explanation for why Collins did not timely file a federal petition – Collins had "decided to pursue certiorari review" in this Court after the denial of Holland's postconviction appeal by the Florida Supreme Court. *See* BIO at 17.

Regardless, neither of these explanations can be reconciled with the fact that Collins repeatedly assured Holland that his state and federal deadlines would be honored, that his procedural and substantive constitutional rights would be asserted to the fullest extent of the law, and Collins repeatedly asked for Holland's "complete confidence" and "sense of unity." J.A. 62, 64. **At no time prior to January 18, 2006,[4] when Holland learned for the first time that the AEDPA statute of limitations had expired, did Collins ever inform Holland of any potential problem with timely filing a federal habeas corpus petition.** The Respondent's attempt to categorize this case as one involving a mere "misunderstanding of law" should be rejected. *Cf. Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003) (observing that

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[3] The Respondent acknowledges that Collins' explanation based on this theory was "erroneous." *Id.* at 9, 42.

[4] There is a typographical error on page 2 of Holland's opening brief. The correct date when Holland first learned that the statute of limitations had expired was January 18, 2006, not 2005.

"the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing").

### C. 28 U.S.C. §2254(i) Does Not Prohibit Equitable Tolling Based on Collateral Counsel's Conduct.

Relying primarily on *Coleman v. Thompson*, 501 U.S. 722 (1991), Respondent contends that §2254(i),[5] a section of the AEDPA wholly apart from the statute of limitations section, "inferentially bars" habeas petitioners from "using" the gross ineffectiveness of their collateral counsel as a basis for equitable tolling, which, in Respondent's view, is a "form of 'relief'" from the statute of limitations. Brief of Resp. at 19, 32.[6] The Respondent's argument is wholly without merit.

*Coleman* involved procedural default, counsel's late filing of a notice of appeal, and whether counsel's actions provided cause to excuse the default on federal habeas corpus review. *Coleman* had nothing to do with equitable tolling of AEDPA's statute of

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[5] 28 U.S.C. §2254(i) provides:

> (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

[6] Notably, the Amicus brief from various states filed in support of Respondent's position makes no such argument.

limitations. The AEDPA, which provides for up to two appointed counsel in a capital habeas action, did not exist when *Coleman* was decided.[7] Holland's case is not about a constitutional (or even statutory) right to counsel during state or federal postconviction litigation and he is not asserting "a ground for relief" from the state court judgment "in a proceeding arising under section 2254."[8]

This case is about whether Holland is entitled to equitable tolling given the perfect storm of extraordinary circumstances surrounding the late filing of his federal habeas corpus petition and whether the Eleventh Circuit's "rule" excluding any type of

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[7] Under Respondent's analysis, if a court appointed attorney in a federal habeas case acted unprofessionally, no federal judge could remove and replace this court appointed attorney with another because that would provide a form of "relief" for the Petitioner.

[8] By analogy, habeas petitioners also have no "right" to a stay and abeyance of their federal habeas corpus petitions when a mixed petition is filed. Yet this Court, acknowledging the "gravity" of the problem associated with the filing of a mixed petition given the AEDPA's statute of limitations, concluded that district courts are vested with the authority to issue a stay and abeyance of the federal habeas proceeding and that "AEDPA does not deprive district courts of that authority." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Mindful of the "potential" that the stay and abeyance procedure might have to undermine AEDPA's goals of encouraging finality and streamlining federal habeas corpus proceedings, the Court noted that a stay and abeyance would only be appropriate in "limited circumstances," that is, when good cause has been shown and the unexhausted claims are not plainly meritless. *Id.* at 277.

attorney misconduct from the equitable analysis is consistent with longstanding equitable principles. *See* Brief for Pet. at 54 n.49; 56 n.52. The State filed motions in state court which silenced Holland and made him accept Collins' representation, the Florida Supreme Court and the Florida Bar looked the other way despite Holland's pleas, and Collins solicited Holland's trust and betrayed it in the face of specific instructions from Holland that Collins timely file a federal petition. Collins, *who the State insisted that Holland rely upon*, not only failed to file a federal petition but also failed to advise Holland that state postconviction proceedings had ended and the federal clock had again started ticking. These circumstances are extraordinary.

### D. There is A Difference When Counsel Ignores Requests/Instructions.

Respondent contends that Collins' conduct amounted to "garden variety" negligence for which equitable tolling is not available. Brief of Resp. at 44. However, the Eleventh Circuit did not characterize Collins' actions as merely negligent but assumed he was "grossly negligent" due to a combination of factors including his failure to communicate with Holland about the status of his appeal to the Florida Supreme Court and his "failure to file a federal habeas petition timely, *despite repeated instructions to do so.*" J.A. 110 (emphasis added).

But Respondent contends that there is no "meaningful difference" between an attorney who fails to understand the law and, as a consequence, files an untimely petition (ostensibly "mere negligence"), and an attorney "who fails to file the petition despite his client's direction." Brief for Resp. at 20. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court rejected this premise:

> We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. . . . ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit."). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies on counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes. At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal cannot later complain that, by following his instructions, his counsel performed deficiently. . . . The question presented in this case lies between those poles: Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?
>
> . . .

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning – advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. . . . If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?

*Id.* at 477-478 (citations omitted). Holland repeatedly instructed Collins to file his habeas petition in a timely fashion. In conjunction with the other extraordinary circumstances Holland faced and his unquestionable

diligence, equitable tolling is warranted on this record.

## CONCLUSION

For these reasons and those in the Brief of Petitioner, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

(4)

No. 09-5327

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IN THE

# Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner,*

—v.—

STATE OF FLORIDA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Florida is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving serious questions regarding a federal court's authority to entertain a habeas corpus petition filed by an indigent state prisoner claiming that he is in custody in violation of federal law. Given its longstanding interest in the vindication of federal rights, the questions before the Court are of substantial importance to the ACLU and its members.

## STATEMENT OF THE CASE

The petitioner, Albert Holland, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. The district court dismissed the petition as untimely in light of the one-year limitation period in 28 U.S.C.

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[1] Letters of consent to the filing of this *amicus* brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief's preparation or submission.

§ 2244(d)(1). The district court concluded that equitable tolling of the limitation period was unwarranted. On appeal, the United States Court of Appeals for the Eleventh Circuit acknowledged that the limitation period in § 2244(d)(1) is subject to equitable tolling, but affirmed the district court's dismissal of the petition on the ground that the "professional negligence" of the petitioner's counsel in state court did not establish the necessary "extraordinary circumstance" needed for equitable tolling. This Court granted certiorari to review the Eleventh Circuit's judgment.

## SUMMARY OF ARGUMENT

The petitioner's brief demonstrates that his application for federal habeas corpus relief was filed late because of assigned counsel's gross negligence and that, in these extraordinary circumstances, the Eleventh Circuit should have held that the limitation period in § 2244(d)(1) was equitably tolled. This brief is exclusively addressed to an issue antecedent to, and thus fairly included within, the question whether equitable tolling was appropriate on this record—namely, whether the limitation period in § 2244(d)(1) is subject to equitable tolling. Specifically, it elaborates upon the showing in petitioner's brief that Congress intended the time limit established by § 2244(d)(1) to be a traditional period of limitation, subject to equitable tolling.

By its explicit terms, § 2244(d)(1) creates a "period of limitation" rather than a jurisdictional requirement, and therefore, as this Court's precedents make clear, it is presumptively subject to equitable tolling. Congress is assumed to act against the backdrop of this Court's precedents and thus must be assumed to have established this period of limitation in the expectation that federal courts would relax the limitation in exceptional circumstances.

Nothing in the text of § 2244(d)(1) or in any other statute rebuts the presumption that equitable tolling is available. The existence of the statutory tolling provision in 28 U.S.C. § 2244(d)(2) does not foreclose equitable tolling by negative implication. This Court has often held that equitable tolling is not eclipsed by the mere presence of a statutory tolling provision, especially when the statutory tolling provision has a reasonable explanation. The provision in § 2244(d)(2) is easily explained as an accommodation of the requirement that state prisoners must exhaust state avenues for litigating federal claims before applying to the federal courts for habeas corpus relief.

None of the individual paragraphs in § 2244(d)(1) suggests that equitable tolling is unavailable. Paragraphs (B) and (D) are not statutory tolling provisions, but function as statutes of repose. Their purpose is to impose caps on the equitable tolling that the limitation period in § 2244(d)(1) would otherwise permit. They address

only cases in which state authorities create an impediment to filing a federal petition and cases in which even diligent petitioners are unable to discover the facts supporting their claims. The provision for these particular scenarios in paragraphs (B) and (D) does not foreclose equitable tolling in other kinds of cases in which Congress has created no statutory caps on the tolling the courts determine to be appropriate *ad hoc*.

Neither 28 U.S.C. § 2263(b)(3) nor 28 U.S.C. § 2254(i) has any bearing on the availability of equitable tolling in cases governed by § 2244(d)(1). Section 2263(b)(3) functions as a statute of repose in capital cases arising from states that have invoked Chapter 154. Section 2254(i) only disclaims counsel malfeasance at the post-conviction stage as a ground for *relief* in habeas corpus proceedings.

Equitable tolling of the limitation period in § 2244(d)(1) raises none of the problems this Court has noted in other contexts, particularly when equitable tolling might be inconsistent with a statutory scheme permitting private suits against a sovereign. A petition for federal habeas corpus relief is a traditional "officer suit," in which state sovereign immunity is not implicated. When this Court has found equitable tolling unavailable in other instances, it has been in light of numerous special circumstances that distinguish those cases from this case.

## ARGUMENT

### I. CONGRESS ENACTED 28 U.S.C. § 2244(d)(1) AS A NON-JURISDICTIONAL LIMITATION PERIOD SUBJECT TO EQUITABLE TOLLING, ALLOWING COURTS THE FLEXIBILITY NEEDED TO DO JUSTICE IN EXCEPTIONAL CIRCUMSTANCES

This Court's precedents draw a crucial distinction between a limitation period, which governs the way claims are processed, and a jurisdictional requirement, which specifies the limits of judicial power. *E.g.*, *Bowles v. Russell*, 551 U.S. 205 (2007). Concomitantly, the precedents explain the quite different implications that follow from Congress' decision to create one kind of time limit rather than the other. A jurisdictional requirement does *not* customarily allow for equitable tolling.[2] A period of limitation *does*. [3]

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[2] *Bowles*, supra, at 214. The Court explained in *Bowles* that reading the text of 28 U.S.C. § 2107 to establish a jurisdictional bar was consistent with a long tradition of treating time limits for "taking an appeal" to be "mandatory and jurisdictional." *Id.*, at 209, quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (*per curiam*). The period of limitation established by § 2244(d)(1) is not a time limit for "taking an appeal," but is, instead, a statute of limitations for initiating an independent original action in a federal district court. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (distinguishing habeas corpus proceedings from appellate review).

As petitioner's brief explains, this Court has already recognized that 28 U.S.C. § 2244(d)(1) by its very terms is a "period of limitation," not a jurisdictional requirement. *Day v. McDonough*, 547 U.S. 198, 205 (2006). Accordingly, as eleven circuits have held,[4] its limitation period, or the similar period in 28 U.S.C. § 2255(f), allows for equitable tolling.[5]

---

[3] Legions of cases hold that if a time limit is understood to be a statute of limitations, it is also understood to permit equitable tolling. *E.g.,Young v.United States*, 535 U.S. 43, 49 (2002); *Bowen v. City of New York*, 476 U.S. 467, 479-80 (1986); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982); *Amer. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-58 (1974); *Honda v. Clark*, 386 U.S. 484, 501 (1967). Of course, there may be a fair debate about the box into which a particular statute fits. But once a statute is put in one box or the other, there is no debate about the implications that customarily follow.

[4] *Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Miller v. New Jersey Dep't of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 329-40 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *McClendon v. Sherman*, 329 F.3d 490, 492 (6th Cir. 2003); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999); *Calderon v U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997), overruled on other grd's, 163 F.3d 530 (9th Cir. 1998)(en banc); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Sandvik v. United States*, 177 F.3d 1269, 1270 (11th Cir. 1999). The question is open in the D.C. Circuit. *United States v. Pollard*, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005).

[5] See also H.R. Conf. Rep. No. 104-518, at 111 (1996), 1996 U.S.

(continued...)

In light of this Court's precedents, Congress is presumptively aware that if it chooses to create a jurisdictional mandate, it cannot rely on the courts to make adjustments when justice requires. Instead, Congress must anticipate scenarios that warrant dispensation and provide for them in the statute. This is dangerous ground, of course. It is difficult, if not impossible, to think of every deserving case that may arise, and Congress must necessarily steel itself for injustice in some number of unanticipated instances. Put differently, Congress must conclude that competing values (e.g., stability and finality) are so important in the context at hand that they demand a rigid jurisdictional bar, subject only to the exceptions that Congress itself identifies, notwithstanding the injustice in worthy cases Congress does not foresee.[6]

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(...continued)
Code & Admin. News 924 (stating that the Antiterrorism and Effective Death Penalty Act of 1996 "sets a one year statute of limitation on an application for a habeas writ"); *Calderon*, *supra*, at 1288 (collecting statements by the floor leaders explaining that the bill would establish a "statute of limitations").

[6] The Court explained in *Bowles* that Congress need not fashion statutory exceptions on its own but "may authorize courts to promulgate rules that excuse compliance with statutory time limits" that would otherwise bar federal jurisdiction. *Bowles*, *supra*, at 214-15. Yet any such rules would presumably be case-specific. If Congress were to authorize the judiciary to adopt a
(continued...)

If, by contrast, Congress chooses to create a limitation period, quite different implications customarily attach. Among these implications is equitable tolling. This is far safer ground. Congress need not anticipate all the scenarios in which tolling may be justified, but can rely on courts to exercise case-by-case judgment. The point of creating a period of limitation is to permit flexibility in exceptional cases.

Given this Court's precedents, Congress must be assumed to understand all this and, accordingly, to enact a limitation period fully appreciating that courts will make *ad hoc* adjustments in the interests of equity. If this Court is to respect Congress' authority, the Court cannot deny the very equitable tolling for which Congress has provided in § 2244(d)(1). The warden's argument that equitable tolling is unavailable in this case invites this Court to play bait-and-switch with the Legislative Branch.

Any argument that Congress must explicitly authorize courts to make *ad hoc* adjustments in the interests of equity is misplaced. Under existing precedents, that is what Congress *does* when it designates a time limit as a period of limitation rather than a jurisdictional requirement. At the

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(...continued)
rule calling for equitable tolling *ad hoc*, Congress would effectively transform the time limit in question into a period of limitation.

very least, placing the burden on Congress to authorize equitable tolling explicitly would reverse the longstanding presumption that a period of limitation is subject to equitable tolling unless Congress enacts an explicit *disclaimer*.

## II. NOTHING IN § 2244(d)(1) OR IN ANY OTHER STATUTE OVERCOMES THE PRESUMPTION IN FAVOR OF EQUITABLE TOLLING

Congress has power to uproot the settled legal landscape by describing a time limit as a period of limitation and nonetheless forbidding equitable tolling. But nothing suggests that Congress has done any such thing here. The familiar "period of limitation" description in § 2244(d)(1) is, instead, a clarion statement that Congress is doing business as usual, operating within the clear boundaries set by this Court's precedents.

**A. Statutory Tolling.** The limitation period in § 2244(d)(1) is subject to tolling according to § 2244(d)(2).[7] Yet providing for *statutory* tolling in no way affects the availability of the *equitable* tolling that a limitation period customarily contemplates.

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[7] Section 2244(d)(2) provides as follows: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

This Court's precedents caution against construing a statute that clearly establishes a period of limitation to bear unconventional meaning. To justify such an extraordinary reading, the Court has required that equitable tolling be "inconsistent with the *text* of the relevant statute." *Young*, *supra*, at 49, quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (emphasis supplied); *Amer. Pipe*, *supra*, at 558 (explaining that the question is whether tolling in a "given context" is "consonant with the legislative scheme"). *See also Greyhound Corp. v. Mt. Hood Stages*, 437 U.S. 322, 338 (1978) (Burger, C.J., concurring) (observing that equitable tolling may be available where a statutory tolling provision fails to provide the time that justice requires).

Nothing in the text of any habeas statute conflicts with the usual equitable tolling that attends a period of limitation. The only positive text here is the basic language in § 2244(d)(1) itself and that text, as noted, establishes a "period of limitation" and not a jurisdictional restriction qualified only by statutory exceptions.[8]

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[8] This Court has demanded that Congress use not only text, but "unambiguous" text, to effect a withdrawal of habeas corpus jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). This Court has also made clear that a withdrawal of habeas jurisdiction would raise serious constitutional questions under the Suspension Clause. *Cf. Boumediene v. Bush*, ___ U.S. ___, ___, 128 S.Ct. 2229, 2270 (2008) (explaining that "the Suspension Clause remains applicable and the writ relevant . . . even where the prisoner is detained after a criminal trial

(continued...)

In this instance, moreover, there is a self-evident reason why § 2244(d)(2) always tolls the period of limitation for the "time during which a properly filed application for State post-conviction . . . review . . . is pending." The exhaustion doctrine often requires habeas petitioners to pursue relief via state post-conviction proceedings before they seek federal habeas relief. The statutory tolling arrangement in § 2244(d)(2) reconciles the policy behind the limitation period (encouraging petitioners to file early) with the policy embedded in the exhaustion requirement (encouraging petitioners to file late—that is, at a time when federal court action will not interfere with proceedings in state court). *Duncan v. Walker*, 533 U.S. 167, 179 (2001).

Statutory tolling to accommodate the exhaustion doctrine only makes sense. One can scarcely imagine any knowledgeable drafter proposing any other mechanism. It would have been bizarre to ignore the exhaustion requirement and rely on equitable tolling to sort out the tension between the time limit and exhaustion on a case-by-case basis. Certainly, Congress' use of statutory tolling to square the period of limitation created by § 2244(d)(1) with a longstanding feature of habeas

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(...continued)
conducted in full accordance with the protections of the Bill of Rights"). Here, as in *St. Cyr*, the avoidance of Suspension Clause questions is in itself a sufficient reason for construing a statute not to restrict habeas jurisdiction. *See St. Cyr*, supra, at 301 n.13.

jurisprudence is no basis for inferring, by negative implication, that Congress has departed in this instance from the customary expectations regarding a period of limitation.

**B. Starting Points.** The starting points for the period of limitation in § 2244(d)(1) are also perfectly consistent with conventional practice and, accordingly, with equitable tolling.[9] Paragraph (A) identifies the basic trigger for most cases and thus supplies a necessary feature of any time limit—namely, the date on which the judgment under attack "became final by the conclusion of direct

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[9] Section 2244(d)(1) provides as follows: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

review or the expiration of the time for seeking such review."

Paragraph (C) accommodates cases in which prisoners claim that they are in custody in violation of a "newly recognized" constitutional right that is "made retroactively applicable to cases on collateral review." The period of limitation plainly must be tailored to account for changes in this Court's understandings of constitutional rights. Paragraph (C) is not an adjustment of the limitation period in anticipation of exceptional circumstances. The point is not that petitioners whose cases fall under this heading should be excused for failing to file petitions earlier. Instead, the idea is that some claims are not generally available to be raised until this Court accepts jurisdiction in a particular case (usually a case on direct review) and adopts a novel interpretation of federal law.[10]

**C. Statutes of Repose.** Paragraphs (B) and (D) can fairly be read as attempts by Congress to anticipate circumstances in which there are reasons for starting a fresh clock. Those cases are obvious

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[10] *See Dodd v. United States*, 545 U.S. 353 (2005) (holding that paragraph (C) starts the clock when this Court first recognizes a "new right"); *Teague v. Lane*, 489 U.S. 288 (1989) (holding that a claim based on a "new rule" of law is rarely cognizable in federal collateral proceedings). We think this is the best understanding of paragraph (C). If, instead, paragraph (C) is understood to start a fresh clock out of fairness to petitioners, then paragraph (C) is a statute of repose, having the effect next described in the text with respect to paragraphs (B) and (D).

and easy to foresee. Paragraph (B) anticipates cases in which state authorities create an "impediment to filing an application." Paragraph (D) anticipates cases in which even petitioners who exercise "due diligence" are unable to discover the "factual predicate" of a claim. Congress might have left cases of this kind to be handled by courts via equitable tolling. But it would have been strange to provide for their disposition *ad hoc*.

The question now is whether by anticipating cases so easily foreseeable Congress somehow meant paragraphs (B) and (D) to foreclose, by negative implication, the equitable tolling that a limitation period brings into play. No such negative inference is justified.

Paragraphs (B) and (D) are not tolling provisions attending the general statute of limitations established by § 2244(d)(1). They are better understood as *statutes of repose*. A statute of limitations conventionally starts the filing period when an action accrues. In the context of habeas challenges to state court judgments, the analogous event is the finality of the judgment under attack. This is why paragraph (A) starts the clock for most cases at the conclusion of direct review. By contrast, a statute of repose typically starts a filing period on some other occasion. Its function is not to toll a limitation period, but rather to place a cap on any tolling a limitation period would otherwise contemplate.

This Court's precedents explain that a statute of repose is not itself presumptively subject to equitable tolling—for the obvious reason that its purpose is to curtail tolling that a court might otherwise think is warranted. *E.g.*, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451-52 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991); *see* 4 Wright & Miller, Fed. Prac. & Proc. § 1056, at 240 (3d ed. 2002).

No one proposes that the time limits specified in paragraphs (B) and (D) are subject to equitable tolling. If, for example, the facts underlying a prisoner's claim could not have been discovered for some time following the conclusion of direct review, the time limit allowed is one year from the date when circumstances changed and the facts became discoverable—not a year plus some further period that a court thinks is equitably justified. By starting the one-year period only when the facts could have been unearthed, Congress has already accounted for the difficulties caused by the petitioner's inability to learn the truth earlier. And Congress has itself determined what additional time these circumstances warrant.

If the statute of repose in paragraph (D) did not exist, the customary equitable tolling that attends the basic statute of limitations (running from the conclusion of direct review) would come into play. A court might give the prisoner the additional time the court thinks is warranted on equitable grounds.

But paragraph (D) *does* exist and puts a one-year outer limit on the time allowable for a case in which the facts were undiscoverable earlier. This is why the cases dealing with the problems caused by undiscoverable facts are not handled via equitable tolling, but as an occasion for interpreting paragraph (D). *Cf. Johnson v. United States*, 544 U.S. 295 (2005) (involving what is now paragraph (4) of § 2255(f)).

Paragraphs (B) and (D) displace equitable tolling by courts in the kinds of cases they capture. But they do not foreclose equitable tolling in other circumstances—like, for example, the tolling that Albert Holland seeks in light of counsel's misbehavior. By contrast, paragraphs (B) and (D) *presuppose* equitable tolling as the conventional baseline and then *restrict* extensions of time in two, easily foreseeable fact patterns. To read paragraphs (B) and (D) to exclude equitable tolling in all other circumstances would be to mistake their place in this statutory framework and, in addition, to attack the premise on which Congress operates—that is, the premise that a limitation period is subject to equitable tolling.

Even if paragraphs (B) and (D) *were* statutory tolling provisions rather than statutes of repose, their presence would not support the inference that they occupy the field to the exclusion of equitable tolling in other kinds of cases, as explained above. *See* pp. x-y, *supra*. This Court's precedents recognize that Congress may enact statutory tolling provisions

that supplement rather than displace equitable tolling. *Young*, *supra*, at 53. In *Young*, the Court dealt with the three-year "lookback period," which governs the bankruptcy priority of IRS claims for taxes. The Court initially held that the "lookback period" is a "limitations period subject to traditional principles of equitable tolling." *Id.* at 47. The Court rejected the taxpayers' argument that the existence of statutory tolling provisions in the Tax Code "displays an intent to preclude equitable tolling of the lookback period." Id. at 52. The Court drew "no negative inference from the presence of an express tolling provision" in one section of a statute and "the absence of one" in another. Id. Indeed, the Court drew no negative inference from the presence of a statutory tolling provision in the very subsection creating the "lookback" limitation period. Id. at 53.

It was reasonable in *Young* for Congress to specify statutory tolling for particular cases. In one instance, Congress may have wanted to instruct non-bankruptcy courts to relax a statute of limitations on equitable grounds while Congress assumed that bankruptcy courts would exercise their "inherent equitable powers" without explicit statutory authorization. Id. at 52. In another instance, Congress may have wanted to clarify that equitable tolling was appropriate while a claimant's "offer in compromise" was pending. Id. at 52-53.

Equally in this case, when Congress fashioned time limits for habeas corpus petitions, it was reasonable for Congress to deal with the foreseeable

cases identified by paragraphs (B) and (D) in the statute while leaving the courts to handle *ad hoc* other, less easily anticipated and described cases.

**D. 28 U.S.C. § 2263(b)(3).** In some lower court cases, wardens have contended that 28 U.S.C. § 2263(b)(3) indicates that Congress did not mean to permit equitable tolling of the period of limitation in § 2244(d)(1).[11] *See, e.g., Calderon, supra,* at 1289

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[11] Section 2263 provides in its entirety as follows:

"(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus

(continued...)

(rejecting this claim). Section 2263(b)(3) is located in Chapter 154 and is applicable only to capital cases from qualifying states. This Court has never had occasion to construe it. On its face, it appears to authorize a 30-day extension of the time limit established by § 2263(a), provided the prisoner files a proper motion in the district court and shows "cause" for failing to file within the ordinary period. It is implausible to think that § 2263(b)(3) bears any significance for the meaning of § 2244(d)(1).

First, by its very terms, § 2263(b)(3) has only to do with the time limit for death penalty cases subject to Chapter 154—not to the general limitation period in § 2244(d)(1), applicable to capital and noncapital cases alike. Obviously, Congress could have allowed for extensions of an extremely brief filing period for Chapter 154 cases (only 180 days), without implying anything about the ordinary statute of limitations in § 2244(d)(1). To draw any negative inference from § 2263(b)(3) outside its own context would be purely conjectural and thus unwarranted. *Cf. Lawrence v. Florida*, 549 U.S. 327, 334 (2007) (declining to draw a negative inference from § 2263(b)(2) for purposes of interpreting § 2244(d)(2)).

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(...continued)

application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section."

Second, § 2263(b)(3) provides for *statutory* tolling and thus has no more bearing on the availability of *equitable* tolling than does § 2244(d)(2). It is not the case, and it has never been the case, that Congress departs from the conventional understanding that a limitation period is subject to equitable tolling whenever Congress enacts a supplemental statutory tolling provision. Statutory tolling displaces equitable tolling only when equitable tolling is inconsistent with the text of the enacted statute. There is no such inconsistency if there is a rational explanation for restricting statutory tolling to certain kinds of cases. There certainly is a rational explanation for § 2263(b)(3)—namely, to orchestrate the short 180-day time limit for death penalty cases subject to Chapter 154.

Third, within its proper sphere, § 2263(b)(3) functions as a *statute of repose*. While it does affirmatively authorize an extension of the time for filing, its primary function is to fix an outer limit. As Judge Kozinski has explained, the "30-day tolling limit was . . . probably designed to cap what would have otherwise been an unlimited tolling period." *Calderon*, *supra*, at 1289. If any inference is to be drawn from § 2263(b)(3) regarding the availability of equitable tolling under § 2244(d)(1), it rests on the fact that § 2244(d)(1) contains no similar cap, and thus it is reasonable to infer that Congress did not

intend to upset the normal default rule allowing longer tolling periods." Id.[12]

**E. 28 U.S.C. § 2254(i).** The warden erroneously proposes that 28 U.S.C. § 2254(i) somehow bears on whether the limitation period in § 2244(d)(1) is subject to equitable tolling.[13] By its explicit terms, § 2254(i) only denies the federal

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[12] The rationale for Chapter 154 is to encourage states to supply competent counsel in state court in exchange for more favorable terms for federal habeas litigation later. It would be consistent, then, for Congress to cap the statutory tolling provision in § 2263(b)(3), but not to place a similar restraint on traditional equitable tolling in run-of-the-mine cases governed by § 2244(d)(1). In *Lindh v. Murphy*, 521 U.S. 320 (1997), the Court held that the 1996 amendments to Chapter 153 were applicable only to cases filed after the date of enactment. In part, the Court relied on the express provision in the Act making Chapter 154 applicable to cases already pending. In *Lindh*, it was reasonable to conclude from the *combination* of the provision regarding Chapter 154 and the absence of any similar provision regarding Chapter 153 that Congress meant to restrict the latter to after-filed petitions. It would not be reasonable to infer that by enacting a particular *operative* provision for death penalty cases in Chapter 154 (here, § 2263(b)(3) on time limits) without a corresponding amendment to Chapter 153, Congress meant to deny any equitable tolling in Chapter 153 cases. One might as well propose that, by negative implication, Chapter 154 effects a wholesale, *sub silentio* repeal of everything in Chapter 153.

[13] Section 2254(i) provides as follows: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

courts a "ground" for awarding federal habeas "relief." That is why § 2254(i) appears where it does, among other limits on habeas relief, *e.g.*, 28 U.S.C. § 2254(d), rather than in § 2244(d)(1)—where it would be located if it had anything to do with the limitation period.[14]

## III. NO OTHER HABEAS CORPUS DOCTRINE SUGGESTS THAT EQUITABLE TOLLING IS UNAVAILABLE

Nothing in this Court's general body of habeas jurisprudence bars equitable tolling of the limitation period in § 2244(d)(1). There are occasions, to be sure, when habeas-specific rules and doctrines produce arrangements that depart from ordinary practice. In *Day*, for example, the Court concluded that justice is best served if district courts are

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[14] If § 2254(i) had the significance the warden insists it has, § 2254(i) would signal that equitable tolling is never appropriate on the basis of attorney malfeasance. Accordingly, § 2254(i) would go only to the threshold question to which this *amicus* brief is addressed, that is, whether the limitation period in § 2244(d)(1) is subject to equitable tolling—not to the further question whether, given the availability of equitable tolling in some case, tolling is warranted on the facts in this record. A blanket prohibition on tolling because of counsel misbehavior would be the antithesis of equitable tolling, which is by nature *ad hoc*. Since § 2254(i) does not foreclose equitable tolling wholesale, and it cannot logically affect equitable tolling retail, § 2254(i) is entirely irrelevant to any matter now before the Court.

allowed *sue sponte* to notice a warden's computation error regarding the § 2244(d)(1) limitation period—notwithstanding that an affirmative "limitation" defense ordinarily must be raised or forfeited. *Day*, *supra*, at 202, 209. Yet the point of *Day* and similar cases is not that habeas corpus should be governed by rigid rules inapplicable elsewhere, but that habeas cases should be processed flexibly in a way that attends properly to all the interests at stake.

In *Day* itself, it was clear that the district court might have informed the warden of the computation error and entertained an amendment to the answer. In those circumstances, the majority concluded that it would have been unduly formalistic to distinguish between what the court did and what it might have done. Flexibility in habeas corpus is a two-way street. Just as the Court eschews rigid habeas corpus rules that "trap the unwary *pro se* prisoner," the Court sometimes permits a district court to notice an error that, if uncorrected, would deprive a warden of a valid defense. *Day*, *supra*, at 209, quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[15] At the end of *Day*, equitable discretion was preserved.

The Court also approved discretion with respect to § 2244(d)(1) in *Rhines v. Weber*, 544 U.S. 269 (2005). There, the Court recognized that the enforcement of the "total exhaustion" rule announced

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[15] Of course, the Court did not suggest that a limitation defense under § 2244(d)(1) can be raised at any time, as though it were a jurisdictional objection.

in *Rose v. Lundy*, 455 U.S. 509 (1982), might work an injustice if a prisoner whose "mixed" application was dismissed could not satisfy the exhaustion doctrine and return to federal court before the limitation period ran out. To avoid unfairness, the Court allowed the district court to hold the prisoner's federal petition in abeyance, thus ensuring that the prisoner had a chance to press all his claims in a single petition as *Lundy* envisions. The lesson was again the same: the limitation period in § 2244(d)(1) can be managed *ad hoc* to avoid perverse results.

The warden contends that one aspect of the Court's procedural default doctrine cuts against the availability of equitable tolling in § 2244(d)(1) cases. Since counsel malfeasance does not ordinarily establish "cause" excusing default, so this argument goes, consistency demands that counsel malfeasance should not be the basis for equitable tolling. But this is to mix cabbages and kings. According to this Court's precedents, the principal reason that counsel error does not excuse procedural default is that counsel's failure to raise a claim in state court may have been deliberate—an attempt to "sandbag" the state courts and save the claim for federal habeas. *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977). That rationale does not travel to counsel's failure to file a federal petition within the limitation period in § 2244(d)(1). In this context, there can be no tactical explanation for counsel's conduct.

## IV. EQUITABLE TOLLING OF THE LIMITATION PERIOD IN § 2244(d)(1) IMPLICATES NONE OF THE ISSUES RAISED WITH RESPECT TO THE TIMING OF LAWSUITS AGAINST A SOVEREIGN

In recent years, this Court has acknowledged that the familiar distinction between jurisdictional requirements and claim-processing rules can be elusive in some contexts. The task is to implement congressional policy. Yet it is not always easy to ascertain what that policy is, because the statutes Congress enacts can be ambiguous and because some time limits operate in circumstances where it is clear that Congress meant to be absolutist about a filing period, even though Congress did not specify a jurisdictional bar.

This case, however, raises none of the difficulties the Court has faced elsewhere. Congress' decision to adopt a period of limitation rather than a jurisdictional requirement is perfectly clear, and the customary understanding that the limitation period is subject to equitable tolling is not rebutted by anything in habeas law. Nor does deciding this case within the conventional framework risk broaching issues of wider jurisprudential significance.

In particular, this case raises none of the concerns the Court has noted when Congress adopts time limits for suits against the United States, which may be conditions on the judicial power that the Government's waiver of immunity admits. The

limitation period in § 2244(d)(1) is not a condition on a state's consent to be sued and thus cannot be understood to circumscribe the judicial power a federal court has to exercise. A habeas corpus application is a quintessential "officer suit" in which the state's immunity is not implicated. *Ex parte Young*, 209 U.S. 123, 168 (1908) (explaining that a habeas corpus petition naming a custodian as respondent is not a "suit against the state"). Since sovereign immunity has no bearing here, nothing in the statutes governing habeas litigation, far less the limitation period in § 2244(d)(1), can be regarded as jurisdictional in the sense that it defines the boundaries of a state's consent to be sued.

In an abundance of caution, we want to distinguish two cases decided against the backdrop of the Federal Government's waiver of sovereign immunity, *United States v. Beggerly*, 524 U.S. 38 (1998), and *United States v. Brockamp*, 519 U.S. 347 (1997)—*Beggerly* because it is cited by the warden in this case, *Brockamp* because it is often cited in the case law on equitable tolling generally. In both instances, the Court concluded that equitable tolling was unwarranted, despite Congress' failure to state clearly that a time limit was to be a jurisdictional bar. Yet the circumstances in both cases were quite different from the circumstances here.

The plaintiffs in *Beggerly* sued the United States for an order setting aside a settlement in a previous suit, under which the Government had obtained title to certain land. They based

jurisdiction in the district court on two grounds, one of which was the Quiet Title Act, 28 U.S.C. § 2609a. The Court held that the action was barred by the "express 12-year statute of limitations" for QTA actions, established by the QTA itself in § 2409a(g). The circuit court below had allowed the plaintiffs more than twelve years to file their complaint on the theory that the statute of limitations was subject to equitable tolling and that tolling was appropriate in this instance in view of the plaintiffs' diligence in pursuing their rights. This Court held, however, that equitable tolling was "not permissible," because it would be "incompatible with the Act." Id. at 48-49.

*Beggerly* is distinguishable on three grounds.

First, while the Court described the time limit in § 2409a(g) as a "statute of limitations," 524 U.S. at 48, the time limit was written as a jurisdictional requirement. Congress did not articulate the 12-year time limit as a conventional "limitation period," but, instead, employed the absolutist language of a jurisdictional prohibition: "Any civil action . . . shall be barred unless it is commenced within" the time specified. Likewise, the Court may have treated the time limit in § 2409a(g) as jurisdictional on the theory that it was a condition on the Government's consent to be sued.[16] No such concern is implicated

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[16] In *Block v. North Dakota*, 461 U.S. 273 (1983), this Court had held that the time limit specified for quiet title actions under the QTA was a condition on the waiver of sovereign immunity the Act was adopted to achieve. To be sure, in *Irwin v. Dep't of* (continued...)

in this case, involving a habeas corpus petition seeking release from the custody of state executive officers.

Second, while the Court in *Beggerly* said that the time limit in § 2409a(g) "*effectively* allowed for *equitable* tolling," 524 U.S. at 48 (emphasis added), § 2409a(g) was actually, of course, a *statutory* provision. It had an equitable flavor only inasmuch as it started the clock when a claimant "knew or should have known of the claim of the United States" and, into the bargain, provided a generous filing period of twelve years. That filling period, in turn, functioned as a *period of repose*—not itself customarily subject to equitable tolling. The Court did not use the "statute of repose" nomenclature in *Beggerly*, but did make the functional point—namely, that Congress had anticipated this kind of case and decided, in the statute itself, that twelve years was

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(...continued)
*Veterans Affairs*, 498 U.S. 89 (1990), the Court had held that, in future, a time limit that would presumptively admit equitable tolling in a suit against a private defendant would also presumptively warrant equitable tolling in a suit against the United States. Yet *Irwin* dealt with suits under Title VII and did not necessarily control actions under other statutes. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133, 137-38 (2008). Particularly in a case involving the Government's proprietary interest in land, the Court in *Beggerly* may have hesitated to assume that sovereign immunity was irrelevant. Cf. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (holding that state executive officers could set up the state's sovereign immunity to defeat the functional equivalent of a quiet title action).

sufficient. Any extension of the 12-year period by judges would have been inconsistent with the cap that § 2409a(g) imposed. In this case, Mr. Holland does not contend that the statutes of repose in § 2244(d) are subject to judicial tailoring in the name of equity. He rests on the equitable tolling that the general limitation period contemplates for other circumstances.

Third, the Court in *Beggerly* listed two context-specific considerations that fortified its conclusion. The 12-year time limit was itself "unusually generous," and it affected the interests of landowners, who need to "know with certainty what their rights are, and the period during which those rights may be subject to challenge." 524 U.S. at 48-49. Neither of those considerations figures in this case. The limitation period in § 2244(d)(1) is not unusually generous. Prior to its enactment, habeas corpus petitions were not subject to any fixed filing period at all. *See Lonchar v. Thomas*, 517 U.S. 314 (1996) (concluding that a petition could not be dismissed even though it might have been filed six years earlier). The institution of *any* stated time period for filing a habeas petition, certainly a time period of a single year, is a stark departure from tradition.

It may be said that equitable tolling in habeas cases diminishes the force of the limitation period as an incentive to seek relief as soon as possible and thus, at the margin, compromises state interests in expediting federal habeas litigation. Yet state

interests in speeding prisoners into the federal forum must be balanced against the federal and individual interests in federal adjudication of what may be meritorious claims. As Judge Kozinski has pointed out, the general limitation period in § 2244(d)(1), which operates in most instances, "will doubtless speed up the habeas process considerably," and equitable tolling in extraordinary circumstances will rarely slow things down—and then only in an individual case and for a limited time. *Calderon*, *supra*, at 1288-89.

The plaintiffs in *Brockamp* were federal taxpayers who had failed to seek refunds within the time limit prescribed by statute. They contended that if they had sought restitution from private defendants in analogous common law suits (for money had and received) the filing period would have been subject to equitable tolling. Relying on *Irwin*, *supra*, they argued that the statutory time limit applicable to their claims against the IRS could equally be equitably tolled. This Court described the time limit as a "statutory time period" and assumed *arguendo* that the analogy to a suit for restitution was sound. But the Court nonetheless rejected the taxpayers' argument, because, in the special context of tax refund claims against the United States, there were "strong reasons" for concluding that Congress "did *not* want the equitable tolling doctrine to apply." *Brockamp*, supra, at 350.

Examining the statutory scheme with care, the Court found numerous indications that the time

limits it prescribed could not be read to contain "implicit exceptions." By contrast to "ordinary limitations statutes [which] use fairly simple language," the numerous time limits in this statute were stated in "unusually emphatic form." *Id.* The statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicat[ed] that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute it wrote." *Id.* at 352. Moreover, the Court recognized that the "nature of the underlying subject matter" (tax collection) strengthened the conclusion that equitable tolling was unavailable. If the time limit for tax refund claims could be equitably tolled, the IRS might be swamped with millions of late-filers all seeking equitable tolling. *Id.*

All these special factors persuaded the Court in *Brockamp* that, in the tax context, Congress meant to "pay the price of occasional unfairness in individual cases . . . in order to maintain a more workable tax enforcement system." Id. at 353. By the same token, the absence of similar reasons for thinking that Congress departed from convention in this case fortifies the conclusion that Congress did not mean to pay such a price in habeas corpus cases. *Brockamp* is thus readily distinguishable.

## CONCLUSION

For the reasons stated above, this Court should conclude that the limitation period in § 2244(d)(1) is subject to equitable tolling and reverse the judgment below.

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# AMICUS CURIAE BRIEF

No. 09-5327

IN THE

# Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner*,

*vs.*

STATE OF FLORIDA,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether equitable tolling is available under the Antiterrorism and Effective Death Penalty Act (AEDPA), and, if so, whether the Eleventh Circuit properly denied Petitioner's contention that he is entitled to equitable tolling of the limitations period based on the alleged "gross negligence" of his counsel?

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IN THE

# Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner*,

*vs.*

STATE OF FLORIDA,

*Respondent*.

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the petitioner proposes granting to the lower federal courts an open-ended, vaguely defined

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

power to make exceptions to the time limit established by Congress to expedite habeas corpus petitions, especially in capital cases. While most federal courts would probably use this power sparingly, it creates the potential for abuse in those courts that have shown the greatest determination to evade the limits of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and perpetuate the evils that statute was enacted to correct. We have seen, with other provisions of this statute, how often courts have erred so seriously as to warrant summary reversal by this Court and how many times egregious errors have gone uncorrected. Authorizing an end run around the AEDPA statute of limitations would be contrary to the interests of victims of crime and the law-abiding public that CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

Albert Holland has received two trials, and has been twice sentenced to death. See *Holland* v. *State*, 636 So. 2d 1289, 1290 (Fla. 1994) (*per curiam*); see also *Holland* v. *State*, 773 So. 2d 1065, 1068 (Fla. 2000) (*per curiam*). His first conviction was overturned based on *Powell* v. *Texas*, 492 U. S. 680 (1989), see *Holland*, 636 So. 2d, at 1291, but the fact that Holland shot and killed Officer Scott Winters has not been questioned. See *id.*, at 1294 (McDonnell, J., dissenting).

In July 1990, witnesses saw Holland attack a woman he had met in Pompano Beach, Florida. *Id.*, at 1290. Police officers responded to the call, and Officer Winters began a search for Holland. *Ibid.* A short time later, witnesses saw the two men struggling and saw Holland grab Officer Winters' gun. *Ibid.* Holland shot Officer Winters once in the abdomen and once in the

groin. Officer Winters later died from the wounds. *Ibid.*

In 1996, Holland was tried a second time and was convicted for first-degree murder, attempted first-degree murder, attempted sexual battery, and armed robbery. He was sentenced to death, and the Florida Supreme Court affirmed without dissent, addressing 22 claims. See 773 So. 2d, at 1069, n. 1.

This Court denied certiorari on October 1, 2001, *Holland* v. *Florida*, 534 U. S. 834, starting the one-year clock of the federal habeas statute of limitations, 28 U. S. C. § 2244(d)(1)(A). State postconviction counsel, Bradley Collins, was appointed a month later. Brief for Petitioner 4. He filed the postconviction motion two weeks short of the one-year limit. *Ibid.*[2] The federal clock was stopped during the pendency of this motion. See 28 U. S. C. § 2244(d)(2).

Holland's state postconviction motion raised eight claims. *Holland* v. *State*, 916 So. 2d 750, 755 (Fla. 2005). The trial court held an evidentiary hearing on two of them and found them without merit. The other six "were either legally insufficient, refuted by the record, or procedurally barred." *Ibid.* He appealed the denial of relief to the Florida Supreme Court, which found his claims to be without merit. *Ibid.* Holland also filed an original habeas petition in the Florida Supreme Court alleging four claims of ineffective assistance of appellate counsel. *Id.*, at 760. "Applying the *Strickland* analysis to each of these claims leads to the conclusion that they are without merit." *Ibid.* The state high court issued its decision on November 10, 2005, but did not issue its mandate restarting the

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2 There is an inconsequential dispute between the parties on the exact date. September 17 or 19. Compare Brief for Petitioner 5, n. 4, with Brief for Respondent 9, n 7.

federal clock until December 1. Brief for Petitioner 14-15.

Holland therefore had until December 15, 35 days from the state court decision, to file a federal habeas petition stating the federal claims he had already litigated in the state courts. Collins did not file in time. A letter dated January 31, 2006, indicates that he erroneously believed the time had already run before he was appointed. J. A. 78-79. Holland filed a federal habeas petition *pro se* on January 19, 2006, over a month after the deadline. Brief for Petitioner 17. The Federal District Court dismissed the petition as untimely, and the Court of Appeals for the Eleventh Circuit affirmed. See *Holland* v. *Florida*, 539 F. 3d 1334, 1336 (2008). This Court granted certiorari on October 13, 2009.

## SUMMARY OF ARGUMENT

The question of whether equitable tolling is available for the period of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 cannot be answered merely by categorizing habeas corpus as "equitable." Unlike the common law usage, habeas corpus today has aspects of an appeal, where time limits are applied strictly, as well as a proceeding in equity, where they are applied more flexibly. The question must be answered instead by looking at the language and purpose of the statute.

The detailed structure of § 2244(d) implies that Congress made the exceptions it deemed necessary and did not intend to authorize courts to make additional exceptions through equitable tolling. This conclusion is reinforced by the purpose of the statute. Unlike the other statutes of limitation in this Court's precedents, this statute was enacted for the specific purpose of

reining in courts that Congress believed had given insufficient weight to the State's interest in finality. Congress is unlikely to have intended to grant open-ended authority to evade its limits to the very courts it intended to restrain.

The four paragraphs of § 2244(d)(1) establish alternate starting dates for a straightforward statute of limitations. None is properly characterized as a statute of repose. The reading of the statute proposed by *amicus* ACLU is convoluted and unnecessary. The right reading is the simple reading.

Congress legislated against a case-law background in which the risk of default by habeas counsel was borne by the petitioner, not the state. This background included the very well known and then-recent case of *Coleman* v. *Thompson*. The language of the statute confirms that Congress expected and intended that this allocation continue. Attributing the default of the State's adversary to the State is a necessary evil for trial and the first appeal, but it is not necessary for collateral review.

## ARGUMENT

### I. Habeas corpus as a collateral attack is a unique procedure, not cleanly categorized as either equitable or appellate.

*Young* v. *United States*, 535 U. S. 43, 50 (2002), noted that the usual rule that Congress presumably intends equitable tolling to apply to limitations periods "is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.' " However, the Court has said just the opposite for "statutory provisions specifying the timing

of review," which are typically considered "jurisdictional in nature and must be construed with strict fidelity to their terms." *Stone* v. *INS*, 514 U. S. 386, 405 (1995) (citing *Missouri* v. *Jenkins*, 495 U. S. 33, 45 (1990)).

Not surprisingly, Petitioner and supporting *amici* seize on the *Young* language and couple it with statements by this Court over the years regarding the equitable nature of habeas corpus. See Brief for Petitioner 38; Brief for Eleven Legal Historians as *Amici Curiae* 13. *Amici* Legal Historians devote nearly all of their brief to the point.

If this were a case of the writ of habeas corpus being used for its original purpose, consistently with the common law usage, this would be a stronger argument. In this case, however, the writ is being used to collaterally attack the final judgment of a court of general jurisdiction, alleging mere error, not a lack of jurisdiction. That is a usage unknown to the common law. See Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 468 (1966). In *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830), the Court refused to review constitutional challenges to the final judgment of a circuit court, holding that the court's ruling on matters within its jurisdiction was binding, even in the Supreme Court. See also Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-932 (1998); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 466 (1963). Not until after the Civil War was the concept of "jurisdiction" stretched in federal courts to provide a back-door appeal of certain constitutional issues. See Bator, *supra*, at 467-474; *Stone* v. *Powell*, 428 U. S. 465, 474-476, and nn. 7-8 (1976).

*Amicus* ACLU notes, "The period of limitation established by § 2244(d)(1) is not a time limit for 'taking an appeal,' but is, instead, a statute of limitations for initiating an independent original action in a federal district court." ACLU Brief 5, n. 2. That is true in form but not in substance, when the writ is used to attack the judgment of another court. Even in the very early cases, where the writ could be used to revise a *pretrial* custody determination of another court, this Court recognized that it was appellate in nature, despite the form, and therefore came within the Court's broad appellate jurisdiction, not its narrow original jurisdiction. See *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 100-101 (1807).

When habeas is used as a back-door appeal, the considerations involved are quite different from when it is used for its original, primary purpose of reviewing detention by the executive without judicial authorization. See *Boumediene* v. *Bush*, 553 U. S. __, 128 S. Ct. 2229, 2268-2269, 171 L. Ed. 2d 41, 87-88 (2008). The English authorities noted in the Legal Historians Brief, at pages 3-7, have limited relevance to a writ used for a very different purpose.

Why have the courts generally been so strict with time limits for review, in comparison to the limits for an original action? A plaintiff who has his complaint thrown out by the court of first instance has been denied his day in court. His complaint has not been reviewed on the merits by any court, and it never will be. A would-be appellant has already had his day in one court and is seeking another day in another court. The chance that a genuine miscarriage of justice is going

uncorrected diminishes exponentially with the number of courts that have reviewed the case.[3]

The diminishing returns of successive reviews was among the reasons underlying this Court's decision in *Ross* v. *Moffitt*, 417 U. S. 600, 615-618 (1974), that the Sixth Amendment right to counsel does not extend beyond the first appeal to discretionary review in the state high court or in this Court. Relying on *Ross*, this Court has further held that there is no constitutional right to counsel on state collateral review. *Pennsylvania* v. *Finley*, 481 U. S. 551, 555-557 (1987) (plurality opinion).

Habeas corpus does have some aspects of equity cases, but when it is used to collaterally attack convictions, it also has aspects of an appeal, and a secondary appeal at that. These two aspects point in opposite directions on the question of how strictly courts should apply limitations periods. Certainly one cannot jump directly from statements about habeas and equity to a conclusion that all principles of equity apply. If the petitioner had to come to the court with "clean hands,"

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3. One notorious study claimed a high rate of "serious error" in capital cases that went to federal habeas review from 1976 to 1995. The multiple serious errors of the study itself are well documented. See Minority Views on the Innocence Protection Act of 2002, S. Rep. No. 107-315, 107th Cong., 2d Sess., 69-74 (2002) Among other problems, the study counted as "serious error" cases where the trial was conducted under the law in effect at the time but the judgment was overturned years later after the rules had changed. See *id.*, at 70-71. Given the zigzag course of capital sentencing jurisprudence during that period, this effect is necessarily large. See K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 20-22 (1995), http://www cjlf.org/pubIctns/OverdueProcess.pdf. A decision overturning a death sentence on federal habeas corpus is not necessarily a correction of an injustice. More often, it is the perpetration of an injustice

habeas relief would be immediately denied to any clearly guilty criminal. Although such a limitation has been proposed, see Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970), it has never been adopted.

Just a few weeks before AEDPA became law, this Court explained the limitations of invoking equitable principles to do an end run around a codified rule, the predecessor of the statute at issue in this case. In *Lonchar* v. *Thomas*, 517 U. S. 314, 322 (1996), the Court explained that as habeas corpus evolved beyond a simple examination of the jurisdiction of the committing court, it also evolved into a system of more fixed rules.

> "Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise. Those principles seek to maintain the courts' freedom to issue the writ . . . while at the same time avoiding serious, improper delay, expense, complexity, and interference with a State's interest in the 'finality' of its own legal processes." *Id.*, at 322-323.

If the balance of interests struck by the existing rule was incorrect, the solution lay not in creating an "ad hoc judicial exception" but rather "through congressional legislation or through the formal rulemaking process." *Id.*, at 328. President Clinton signed AEDPA into law 23 days later.

The answer to the puzzle is not found in sweeping generalities about equity or appeals. It is found in the text and the purpose of the statute.

## II. AEDPA must be interpreted in light of Congress's clear purpose of restraining courts it believed had wrongly balanced the competing interests.

The starting point for interpretation is always the text of the statute. In this case, the State has explained how the unusually detailed structure of 28 U. S. C. § 2244(d), with four alternate starting dates and one express tolling provision, is inconsistent with an interpretation that Congress intended to grant the courts an open-ended authority to craft additional exceptions. See Brief for Respondent 25-31. Little needs to be added to this straightforward and powerful argument, although in Part III, *infra*, we will address *amicus* ACLU's convoluted attempt to avoid the clear implication of the statutory text.

Along with the text, the purpose of the statute is also an important consideration. Here, we submit, the Court must consider the fact that AEDPA has a purpose different from the statutes in all the other equitable tolling precedents cited in the briefs. In the statements of supporters of the legislation on the floor of both houses, one message comes through loud and clear. Congress was fed up with the way many of the lower federal courts had been handling capital cases. The supporters filled the Congressional Record with horror stories of protracted proceedings and pointless delays in cases with no genuine issue of guilt of the accused. See 141 Cong. Rec. 14734 (statement of Sen. Feinstein) (1995); *id.*, at 15062 (statement of Sen. Hatch); *id.*, at 15019 (statement of Sen. Specter); *id.*, at 15036-15037 (statement of Sen. Nickles).

Congress's diminished confidence in the federal district and circuit courts can also be seen in the substance of the legislation. Almost every change made is for the purpose of restraining the federal habeas

courts. The most controversial change, by far, was the so-called "deference" standard of § 2254(d). *De novo* review of a state court judgment by a federal district or circuit court would make sense only if one had confidence that in the event of a disagreement the federal court was far more likely to be correct. The new standard was enacted on the express premise that the state courts were "just as good." 141 Cong. Rec. 15062, col. 2 (1995) (statement of Sen. Hatch). The limit on successive petitions was tightened substantially beyond what this Court had required just a few years earlier, compare *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991), with 28 U. S. C. § 2244(b), implying that Congress believed the federal courts had been excessively lax in allowing successive petitions.

The new statute of limitations effectively displaced the prior rule on delayed petitions, Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules).[4] The prior rule is quoted and discussed in *Lonchar* v. *Thomas*, 517 U. S. 314, 326 (1996). It was stated in permissive terms, "may be dismissed." The rule did not give a specific time frame for delay, and it required an affirmative showing of prejudice to the state for a dismissal. Delay could be excused if "petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence . . . ."

In comparison to former Rule 9(a), § 2244(d) shows a tightening all around. The statute is a mandatory period of limitation, not a permissive rule. There is a

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4. In the 2004 rule amendments, former "Rule 9(a) has been deleted as unnecessary in light of the applicable one-year statute of limitations . . . ." Advisory Committee's Notes on 2004 Amendment to Habeas Rule 9, 28 U. S. C., p. 1242 (2006 ed.).

fixed time frame of one year. The delay permitted for grounds not discoverable with reasonable diligence is limited to the factual basis of the claim, not a legal argument. See § 2244(d)(1)(D). Delays for new legal arguments are limited to the very narrow category of rights "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . ." § 2244(d)(1)(C). The requirement for the state to show prejudice is gone, although the state can forfeit the protection of the statute through its own illegal action. See § 2244(d)(1)(B).

This level of detail negates any intent to authorize courts to make additional exceptions, even on the face of this subdivision alone. See Brief for Respondent 25-31. That implication is even more clear, however, when it is considered in light of Congress's disapproval of the way federal courts had been handling habeas corpus, especially in capital cases. Would Congress really delegate an open-ended, unstructured authority to bypass the limitation it imposed to the very courts that it had decided needed to be put on a shorter leash in so many other ways?

When Congress enacted AEDPA, it did so out of the conviction that the federal courts had, overall, struck the balance between finality and rights of the defendant in the wrong place. Finality had not, to that point, been given nearly the weight it deserved in that balance.

Just two years ago, this Court said in regard to *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89 (1990),

> "*Irwin* adopted a '*rebuttable* presumption' of equitable tolling. [*Id.*, at 95] (emphasis added). That presumption seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in the mine run of in-

> stances where it enacted a Government-related statute of limitations. But the word 'rebuttable' means that the presumption is not conclusive. Specific statutory language, for example, could rebut the presumption by demonstrating Congress' intent to the contrary." *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 137-138 (2008).

The specific statutory language spelling out the starting times and tolling in detail, when combined with the overall purpose of the statute to tighten up a system that Congress believed the courts had allowed to get too loose, demonstrates a contrary intent and rebuts the presumption. Congress has already provided for what it perceives to be the equities, see *United States* v. *Beggerly*, 524 U. S. 38, 48 (1998), and courts are not authorized to graft on additional exceptions.

## III. Paragraphs (d)(1)(B)-(D) are detailed exceptions to the general rule of (d)(1)(A), not exceptions to an unwritten, assumed rule of equitable tolling.

The statute of limitation in this case is so unusually detailed, and the negative implication against additional unwritten exceptions so strong, that *amicus* ACLU tries a Hail Mary pass, contending that paragraphs (B) and (D) "are better understood as *statutes of repose*." See ACLU Brief 14 (emphasis in original). Tellingly, the ACLU does not cite a single case or even a single law review article that reads this 14-year-old, much litigated, much discussed statute in this way. That is because this statute is nothing of the sort. First, it is necessary to define the term.

> "Five definitions of statutes of repose have been offered:[23] (1) in the most general sense, statute of repose is synonymous with statute of limitations; (2)

'statute of repose' is a general term that encompasses various statutes, including statutes of limitation (in this view, it is an act that promotes the policy of finality in legal relationship, and it can include any number of statutory devices that accomplish this purpose); (3) it is merely one type of statute of limitations (a suggestion that it is the portion of the statute of limitations that places a cap or outer limit on a statute and that begins to run when the party discovers the existence of injury or cause of action; this third type also is called a 'bifurcated'[24] or 'two-tier'[25] statute); (4) a statute of repose is considered distinct from a statute of limitations because it begins to run at a time unrelated to the traditional cause of action, that is, from the date of the act of injury regardless when discovered; and (5) is synonymous with the 'useful safe life'[26] provisions of product liability statutes.

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[23] Hicks, The Constitutionality of Statutes of Repose: Federalism Reigns, 38 Vand. L. Rev 627 (1985); McGovern, The Variety, Policy, and Constitutionality of Product Liability Statutes of Repose, 30 Am. U. L. Rev. 579, 582-586 (1981).

[24] McGovern, *supra* note 23, at 584 (citing *Gates Rubber Co.* v. *USM Corp.*, 508 F. 2d 603 (7th Cir.), reh'g denied (1975))."

1 C. Corman, Limitation of Actions § 1.3.2.1, pp. 30-31 (1991) (footnotes 25-26 omitted).

*Amicus* ACLU is evidently referring to the third definition, and particularly the parenthetical in that definition. The first, second, and fifth definitions clearly do not apply here. A statute of repose under the fourth definition would begin running on the date

judgment is entered, and nothing in § 2244(d) relates to that date.

Yet on closer examination, the third definition refers to something quite different from paragraphs (B) and (D). The *Gates Rubber* case referred to in the passage above gave as an example an Illinois statute on medical malpractice that began the period of limitation when "the person actually knows or should have known of the facts of hurt and damage to his body; provided that no such action may be commenced more than 10 years after such treatment or operation." *Gates Rubber Co.* v. *USM Corp.*, 508 F. 2d 603, 611-612 (7th Cir. 1975). This statute provides one limitation period based on discovery by the plaintiff and another based on the act of the defendant, and the cause of action may be barred by either limitation, whichever expires first.

*Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991), involved a similar statute. The statute of limitation "adopted" by the Court in that case required a suit to be filed "within one year after the discovery of the facts constituting the violation *and* within three years after such violation." *Id.*, at 360, n. 6 (quoting 15 U. S. C. § 78i(e)) (emphasis added). The second part of the statute is a period of repose, see *id.*, at 360, and it may terminate a cause of action even before the plaintiff learns of its existence. The defendant gets the benefit of whichever alternate period expires first.

The four alternate time periods in § 2244(d)(1) work in the opposite manner. The petitioner gets the benefit of whichever alternative applies to his case and provides the longest period. The statute provides, "The limitation period shall run from the *latest* of— . . . ." 28 U. S. C. § 2244(d)(1) (emphasis added). Nothing in subdivision (d)(1) gives the state the benefit of finality without regard to any of the other alternatives, which

is what an alternative period of repose does. Statutes of repose are alternative ways to cut off a cause of action. The four alternatives of subdivision (d)(1) are alternative ways to keep alive a cause of action. As statutes of limitation go, this one is "unusually generous," cf. *United States* v. *Beggerly*, 524 U. S. 38, 48-49 (1998), in the sense that it gives the plaintiff rather than the defendant the benefit of the alternatives.

*Amicus* ACLU tries to pound the square pegs of subparagraphs (B) and (D) into the round hole of statutes of repose by claiming that the function of the latter "is not to toll a limitation period, but rather to place a cap on any tolling a limitation period would otherwise contemplate." ACLU Brief 14. Yet as *Gates Rubber* and *Lampf* indicate, the alternative statutes of repose were not for the purpose of capping *tolling* of the primary limitation period but rather for providing a complete alternative to the primary limitation period. *Lampf* held that equitable tolling was inconsistent with a period of repose, 501 U. S., at 363, not that capping tolling was the primary purpose of the period of repose. Cf. ACLU Brief 15 (citing *Lampf* for a proposition it does not support).

The ACLU's reading of § 2244(d) is extraordinarily convoluted. Congress's intent, in this reading, was to enact paragraph (A) as the main statute of limitations, assume it was implicitly subject to equitable tolling, and then cap that implied exception with express exceptions, *i.e.*, paragraphs (B) and (D), which are periods of repose not subject to equitable tolling. See ACLU Brief 15. The fundamentally different nature of these paragraphs from paragraph (A) is also merely implied. That would be a bizarre way to write a statute, and therefore it is a bizarre way to read this statute.

The right way to read this statute is the simple way. Congress wanted to enact paragraph (A) as the primary

statute of limitations, but it recognized that this rule would be too harsh in certain circumstances. It considered what circumstances should be exceptions and enacted them as alternative starting dates in paragraphs (B) through (D), and further provided for tolling in subdivision (d)(2) to avoid a conflict with the requirement to exhaust state remedies. Having expressly considered and decided what the exceptions to the main rule would be, Congress did not intend to authorize the courts to create additional exceptions.

## IV. Congress legislated against a background of case law holding that factors internal to the defense do not excuse defaults during collateral review.

When civil cases on statutes of limitation discuss the diligence and defaults of plaintiffs, they typically do not distinguish between the diligence of the plaintiffs personally and that of their attorneys. See, *e.g.*, *Irwin* v. *Dept. of Veterans Affairs*, 498 U. S. 89, 96 (1990) (attorney's absence from office was "garden variety . . . excusable neglect," not basis for tolling). In civil litigation, the risk and burden of a default by an attorney is entirely on the party represented by that attorney, not the opposing party. The remedy would be a malpractice suit against the attorney.

Criminal cases are different for two reasons. First, effective assistance of counsel is a constitutional right. See *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984). Second, the injustice of a wrongful conviction in a major felony case is not compensable by any amount of money. However, claims of ineffective assistance of counsel place unique burdens on the State, and they have great potential for causing rather than correcting miscarriages of justice.

For example, in *Wood* v. *Allen*, 558 U. S. __ (No. 08-9156, Jan. 20, 2010), the state trial judge appointed two experienced attorneys to represent the defendant, plus a third, inexperienced attorney to assist them. See *id.* (slip op., at 2). Having done exactly what the State should do in the circumstances, the State then lost all control. The subsequent decisions of what evidence to investigate and use and how much responsibility to delegate to the rookie, see *id.* (slip op., at 4-5) (Stevens, J., dissenting), were completely beyond the ability of the State to control. When these issues were litigated years later in collateral review, the evidence available consisted entirely of the testimony and correspondence of the State's adversaries. See *ibid.*

Not only can the State not control the events of which the defendant will later complain, it cannot even control the documentation which will enable it to establish what actually happened. This is all in the hands of its adversaries, draped in the cloak of the work product and attorney-client privileges. When those attorneys' effectiveness is challenged, as it always is in capital cases regardless of the actual quality of representation, they may come out swinging in their own defense, or they may fall on their swords and help make the case against themselves for the benefit of their former clients. Defending the actions of a person who does not want to be defended is problematic, to put it mildly. In the present case, the *amici* ethics professors refer to "[u]ncontradicted facts," Brief for Legal Ethics Professors *et al.* as *Amici Curiae* 8, but the reality of ineffective assistance litigation is that the State is severely disadvantaged in its ability to contest the facts.

For trial, the importance of the right of effective assistance requires that we accept this situation as a necessary evil. The further we get from trial, the less necessary and more evil it becomes. That is why this

Court drew the line on the constitutional right to counsel, and hence the right to relief for ineffectiveness, at the first appeal as of right. See *Coleman* v. *Thompson*, 501 U. S. 722, 755-756 (1991).

*Coleman* is the pre-AEDPA case most closely analogous to the present case. It involved the same type of default, missing a deadline. See *id.*, at 727. Coleman claimed the same cause for the default, attorney error. See *id.*, at 752. The *Coleman* opinion expressly joined the constitutional right to effective counsel with the allocation of risk of attorney error.

> "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.' [*Murray* v. *Carrier*, 477 U. S. 478, 488 (1986).] . . . Attorney error that constitutes ineffective assistance of counsel is cause, however. This is not because, as Coleman contends, the error is so bad that 'the lawyer ceases to be an agent of the petitioner.' . . . Rather, as *Carrier* explains, 'if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State.' 477 U. S., at 488. In other words, *it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor*, *i.e.*, 'imputed to the State.' " *Id.*, at 753-754.

Courts generally assume that Congress is aware of the case law background when it legislates. See, *e.g.*, *Ankenbrandt* v. *Richards*, 504 U. S. 689, 700-701 (1992). Sometimes that assumption is a bit of a fiction, but not for *Coleman*. The case was widely publicized and the topic of much debate. Coleman was executed

just three years before the main AEDPA debate in the Senate, and his picture was on the cover of the May 18, 1992 issue of Time Magazine with his fabricated claim of innocence.[5] Congress knew about *Coleman* when it enacted AEDPA.

With well known case law placing the risk of attorney error in collateral proceedings on the petitioner regardless of the magnitude of that error and tying that rule specifically to the right to counsel, what did Congress enact? Congress could, at this point, have either abrogated *Coleman* or passed legislation consistent with *Coleman* and assuming its rule would continue. Congress did the latter.

The rule that ineffective assistance in collateral proceedings is not a ground for relief was explicitly codified in 28 U. S. C. § 2254(i). Given *Coleman*'s express connection between the right to counsel and the allocation of risk of attorney error of default, this provision indicates Congress's agreement with that allocation.

More importantly, when we look at § 2244(d)(1)(D), we see that Congress agreed that factors external to the defense, not just external to the defendant individually, were deemed necessary to extend the time. Discovery of new facts is cause to restart the clock only if those facts could not previously "have been discovered through the exercise of due diligence." Clearly, this requires the diligence of the attorney, as the defendant

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5. The DNA technology available at the time provided substantial corroboration of Coleman's guilt. See *Coleman* v. *Thompson*, 798 F Supp. 1209, 1217 (WD Va. 1992), aff'd 966 F. 2d 1441 (CA4 1992), stay denied 504 U. S. 188 (1992). Years later, improved technology eliminated any doubt. See Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va , Washington Post, Jan 13, 2006, p. A1

himself will be incarcerated and have virtually no ability to investigate any facts not already known to him.

If paragraph (D) were subject to equitable tolling for a default of the attorney in failing to investigate the facts, then the requirement of diligence that Congress expressly wrote into the statute would be implicitly repealed. If not, then we must ask if Congress intended to allow equitable tolling for other defaults of the attorney but not for failure to investigate facts. That would be an extremely strange choice as a policy matter. Discovery of important new facts unknown to the state courts at the time of their decision is the most compelling reason to reopen the case, especially if the facts relate to guilt of the crime. Second-guessing the state courts' legal conclusions on the same facts is far less likely to produce a better result. See *supra*, at 12.

Unlike the pre-AEDPA procedural-default case law, Congress did not provide that compelling evidence of actual innocence would be sufficient by itself to revive an otherwise time-barred habeas petition. Cf. *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986). This omission must be intentional, as Congress addressed the actual innocence issue in the successive petition subdivision of the same section. See § 2244(b)(2)(B). The statute of limitation is actually the more generous of these two provisions, as it requires new facts alone while the successive petition rule requires new facts *and* innocence.

Why did Congress leave out the *Carrier* safety valve? Perhaps it believed that actually innocent petitioners would be able to meet the cause test. See *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982). Perhaps it had confidence in state court procedures and executive clemency to deal with those rare cases. See *Herrera* v. *Collins*, 506 U. S. 390, 415 (1993). Perhaps it was so appalled

by the capital defense bar's record of misuse of available procedures, as exemplified in the *Harris* debacle, that it simply could not risk opening a loophole it expected to be exploited with fabricated, eleventh-hour claims of innocence.

Whatever the reason, there is no doubt it was intentional. Questions have been raised as to whether the statute of limitations would be constitutional if applied to block a habeas petition despite a strong claim of actual innocence. That issue should be addressed in a case which actually presents it. See *Lucidore* v. *New York State Division of Parole*, 209 F. 3d 107, 113-114 (CA2 2000). The doctrine of constitutional doubt does not apply when the meaning of legislation is clear. See *Miller* v. *French*, 530 U. S. 327, 336 (2000). A possibility of an unconstitutional application in a rare case should not produce a distortion in the interpretation of a statute that would be far broader than the problem and that threatens to defeat the statute's purpose in a great many cases. Congress intended a "strict" statute of limitation, not one subject to open-ended exceptions created ad hoc by the very courts it intended to restrain. See Part II, *supra*, at 11-14.

An exception specifically for actual innocence claims would be best created by amendment of the statute. See *Dodd* v. *United States*, 545 U. S. 353, 359-360 (2005). Congress is aware of the issue and has held a hearing on an "actual innocence" bill. See House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Hearing to: Consider the Impact of Federal *Habeas Corpus* Limitations on Death Penalty Appeals (Dec. 28, 2009), http://judiciary.house.gov/hearings/hear_091208_1.html. While this Court would have an obligation to address the constitutional issue in a case that actually presented it, it has no obligation to reach out and decide it in a case which does not. Hol-

land's very long statement of the case does not deny that he murdered Officer Scott Winters in the performance of his duty. See Brief for Petitioner 2-33.

A guilty murderer has received a trial, an appeal, a state collateral review, an appeal from the state collateral review, and an original state habeas review in the state supreme court. Congress has required that a petition for *yet another* review in federal court be filed within one year of four different dates, which take into account the reasons for delay that Congress deemed sufficient. No petition was filed within that time, and the State is entitled under the law to have its judgment be genuinely final.

## CONCLUSION

The decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

January, 2010

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 09-5327

IN THE

# Supreme Court of the United States

ALBERT HOLLAND,

*Petitioner,*

v.

STATE OF FLORIDA,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

## BRIEF OF ELEVEN LEGAL HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICI[1]

*Amici curiae* are professors of legal history at law schools and universities in the United States, England, and Australia with expertise in English and/or early American legal history. Judging from its Brief in Opposition to the Petition, Respondent will contend that the doctrine of equitable tolling is inapplicable in cases subject to the Antiterrorism and Effective Death Penalty Act of 1996. *Amici curiae*, who differ with that view, have a professional interest in ensuring that the Court is fully and accurately informed regarding the historical scope of the common law writ of habeas corpus and the centuries-old role that equity has played in its administration.

## SUMMARY OF ARGUMENT

Since the early 17th Century, when the King's Bench imbued the writ of habeas corpus with the quasi-divine powers of the royal prerogative, habeas jurisdiction has been governed by equitable principles and habeas jurisprudence has been developed more by judicial exposition than by statute. Much the same is true in America, where this Court has repeatedly acknowledged the equitable underpinnings of its habeas corpus jurisdiction and

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[1] A list of the *amici* appears in the Appendix. The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

repeatedly looked to its own precedents in addition to current habeas statutes.

*Amici* have no position on whether Petitioner has made a case for equitable tolling, but they are certain that Respondent errs in contending that application of the equitable tolling doctrine is precluded by the Antiterrorism and Effective Death Penalty Act, which this Court has often construed in light of its traditional equitable authority and which has no explicit prohibition against the courts' equitable power to toll statutes of limitations.

## ARGUMENT

### EQUITABLE PRINCIPLES HAVE HISTORICALLY GUIDED THE EXERCISE OF HABEAS CORPUS

Respondent's position – that equitable tolling of the limitations provision of the Antiterrorism and Effective Death Penalty Act is impermissible – ignores centuries of practice in English and American courts under which the disposition of habeas corpus petitions has been heavily influenced by equitable principles. As we show below, the issue as a matter of English jurisprudence may be seen in the writ's emergence as one of the royal prerogatives, while in America the point is made with striking clarity in many decisions of this Court.[2]

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[2] English precedent is important because, "[t]o determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common law usages and the history of habeas corpus both in England and in this country." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (footnote omitted).

### A. The King's Bench Used Equitable Principles When Adjudicating Habeas Corpus Petitions.

In early 17th Century England it came to be understood, through the persistent efforts of the Court of King's Bench (at which, in its medieval origins, the king actually sat) that the writ of habeas corpus derived from powers unique to the king – *i.e.*, his royal prerogative.[3] That power was repeatedly invoked by the King's Bench to persuade other courts and institutions that they were bound to answer the writ and return both the prisoner and an explanation for the prisoner's detention. The prerogative had such force because it "was both within and beyond law, a place where the king's authority mimicked the divine." Halliday & White at 601. Just as God could perform miracles beyond the laws of His created nature, so could the king through his prerogative slip the rigid fetters of the laws promulgated under his authority.

It was also accepted, however, that the prerogative could be exercised only on behalf of the good of the king's subjects, in furtherance of the bond between them and the king himself. *Id.* pp. 602-03.[4] "Miracles performed by the prerogative were a kind of equitable intervention into law's normal operation

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[3] Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 594 (2008) (hereinafter "Halliday & White.").

[4] The other prerogative writs were mandamus, prohibition, certiorari, and quo warranto. Edward Jenks, The Prerogative Writs in English Law, 32 Yale L.J. 523, 527 (1923).

made legal by their being directed 'for the public good."[5]

Sir Edward Coke in describing the prerogative writs stated that they conferred on the King's Bench

> not only jurisdiction to correct errors in judicial proceeding[s], but other errors and misdemeanors extrajudicial tending to the breach of the peace, or oppression of the subjects, or raising of faction * * * or any other manner of misgovernment, so that no wrong or injury, either public or private, can be done, but that this shall be reformed or punished * * *.[6]

Given its status as a writ of the king's prerogative, by which the King's Bench could perform miracles in law and according to Coke correct non-judicial errors "either public or private," it comes as no surprise that equitable principles routinely informed its exercise. Indeed, the key to the prerogative writs

> lay in the court's omnipotence when using them, and that omnipotence primarily stemmed from their equitable character: their embodiment of the King's mercy.

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[5] Paul D. Halliday, *Habeas Corpus: From England to Empire* (Harvard/ Belknap, 2010) (hereinafter "Halliday"). Publication is expected in February 2010. We have requested permission under Supreme Court Rule 32.3 to lodge a galley copy with the Clerk and have offered galley copies to the parties.

[6] Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (1644), iv, 71.

Halliday & White p. 608. Accordingly, "equitable ideas provide the best explanation for how so many seventeenth- and eighteenth-century subjects could employ habeas to win their freedom" (*id.* pp. 608-09), and records of judicial proceedings in the 17th Century support the conclusion "that seventeenth-century English judges frequently entertained uses of habeas corpus that were equitable in character." *Id.* pp. 610-11 & nn.88-90 (giving examples).[7]

In short, habeas "was an equitable device in all but name, enabling action in response to the particulars of a given circumstance rather than imposing obedience to a set of rules prescribed in precedents." Halliday ch. 4 p. 4 (footnote omitted).

Equity's influence was visible in the *process* employed and the *remedies* imposed by the King's Bench in exercising its habeas jurisdiction. The writ issued "because the justices had become convinced by a story that they should examine more closely the circumstances of a person's imprisonment. The telling of tales, and the discretion of judges in deciding to heed the moral of such tales, was quite like the process used in most courts of equity." Halliday ch. 3 p. 36. And the habeas writ's recipient was commanded to provide a return on pain of punishment, one form of which "had a clear connection to practice in equity: the insertion in *alias* and *pluries* writs of the kind of *subpoena* clauses found in Chancery writs." *Id.* Indeed, so heavily did the King's Court borrow practices from the other side

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[7] *See also* J. H. Baker, An Introduction to English Legal History 111 (4th ed. 2002) (speaking of the prerogative writs and noting that their "jurisdiction was, in other words, equitable").

that Lord Chancellor Ellesmere complained that it "'confound[ed] the distinct jurisdictions of common laws and equity.'" *Id.* p. 37 (citation omitted). Thus, the King Bench

> exercised equity in the conceptual sense by using the tools of equity in the institutional sense: judicial action at common law on the prerogative writs was enforced by borrowing practices of attachment and imprisonment for contempt that were used in courts of equity. The problem was not that common law thought ill of equity. If anything, common law loved equity so well that it threatened to smother it in its embrace. [*Id.* p. 35.]

Habeas practice also mimicked equity in its imaginative accommodations of the strict habeas rule that the factual averments made in the return provided by the writ's recipient could not be challenged. Facts (often dispositive facts) were received "off the return" from people in court, from counsel, and from the court's own officers. *Id.* ch.4 pp. 12-16. And facts (even contradictory facts) might be received before the return was actually filed. *Id.* pp. 16-17. The adoption of these and other practices showed that the "King's Bench worked most energetically in gathering and assessing the facts of people's detention." *Id.* p. 22.

In sum, "[t]hrough the prerogative writs and procedural innovations connected to their development at the opening of the seventeenth

century, equity had been domesticated for use at common law." *Id.* ch. 3, p. 37.

It is also important as an historical matter that the development of the uses of habeas corpus was far more the province of the English courts than the legislature (as would be true in America as well). The Habeas Corpus Act of 1679 "merely codified practices generated by the King's Bench justices," and in the following century "all the important innovations in habeas corpus jurisprudence occurred through judicial use of the common law writ rather than the statutory one." Halliday & White at pp. 611, 612.

### B. This Court Has Repeatedly Recognized The Equitable Underpinnings of Habeas Corpus.

#### 1. Equity's persistent role.

Many decisions of this Court, and many Justices in concurring or dissenting opinions, have long acknowledged and relied on the equitable principles that underlie habeas corpus jurisdiction. Thus, in *Sanders v. United States,* 373 U.S. 1, 17 (1963), the Court noted that "habeas corpus has traditionally been recognized as governed by equitable principles.") (citation omitted). Similarly, in *Schlup v. Delo,* 513 U.S. 298, 319 (1995), the Court said that it "has adhered to the principle that habeas corpus is, at its core, an equitable remedy." *See also id.* ("This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata.").

In *Herrera v. Collins*, 506 U.S. 390, 404 (1993), the Court refused relief to a petitioner whose innocence claim was unaccompanied by an independent constitutional violation, but not without noting that an innocence claim coupled with a constitutional claim may be heard under "the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera* cited *McCleskey v. Zant*, 499 U.S. 467, 502 (1991), in which the Court ruled that, in exercising its habeas jurisdiction, the Court has "equitable discretion to correct a miscarriage of justice." Cf. *Dugger v. Adams*, 489 U.S. 401, 410 (1989) (refusing to "exercise our equitable power to overlook respondent's state procedural default."); *Reed v. Farley*, 512 U.S. 339, 361 n.2 (1994) (Blackmun, dissenting, noting "the equitable considerations that might guide the Court's exercise of its discretion").

The application of equitable principles has not always favored habeas petitioners. Rather, as Justice Scalia noted, concurring in *Reed v. Farley*, 512 U.S. 339, 356 (1994), the Court "has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction" (citing his concurring and dissenting opinion in *Withrow v. Williams*, 507 U.S. 680, 716 (1993) ("Habeas jurisdiction is tempered by the restraints that accompany the exercise of equitable jurisdiction.").

Thus, in *Ex Parte Royal*, 117 U.S. 241 (1886), the Court imposed on petitioners the requirement that they first exhaust available state remedies. In *Stone v. Powell*, 428 U.S. 465 (1976), the Court held that Fourth Amendment exclusionary rule claims fully

and fairly litigated in state court are not cognizable on federal habeas, balancing "values important to our system of government" and "the basis justice of [the prisoner's] incarceration." *Id.* p. 491 n.31. In *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992), denying a claim that execution by lethal gas is cruel and unusual, the Court noted that petitioner "seeks an equitable remedy" and that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and [petitioner's] obvious attempt at manipulation." *Cf. Fay v. Noia*, 372 U.S. 391, 438 (1963) (equitable principles include "the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks").

**2. Judicial vs. statutory exposition.**

We saw above that the King's Bench was the driving force in the elucidation of habeas corpus jurisprudence in England, and a similar path has been followed in America. As the Court explained in *McClesky*, the Judiciary Act of 1789 empowered federal courts to issue writs of habeas corpus to prisoners in federal custody and in 1867 extended the writ to prisoners held in state custody as well. 499 U.S. at 477-78. Yet, "[i]n the early decades of our new federal system, English common law defined the scope of the writ" and "[f]or the most part * * * expansion of the writ has come through judicial decisionmaking." *Id.* pp. 478, 479.[8] And, with

[8] *See Ex Parte Bollman*, 8 U.S. 75, 93, 4 Cranch 75 (1807) ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.").

respect to the precise issue before it – the doctrine of abuse of the writ – the *McClesky* Court noted that the doctrine "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.* p. 489.

Similarly, in *Wainwright v. Sykes*, 433 U.S. 72, 78 (1977), in which the Court reversed the grant of relief to a petitioner who had failed to object at trial to his statements allegedly admitted in violation of *Miranda*, the Court noted that, since the writ was extended by statute in 1867 to prisoners held by the states, it had "grappled with the relationship between the classical common-law writ of habeas corpus and the remedy provided in 28 U.S.C. § 2254." A review of the case law twists and turns demonstrated the "Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing the judicial action has remained unchanged." *Id.* p. 81. *See also Schlup*, 513 U.S. at 319 n.35 ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence.") (citing cases).

In particular, the Court has never hesitated to fill perceived gaps in the statutory scheme. *See Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (holding that the *Kotteakos* harmless error standard applies in a case involving *Doyle* violations, and stating that "[w]e have filled the gaps of the habeas corpus statute with respect to other matters."); *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995) (holding that the writ must issue when a court has "grave doubt" whether a error in

the trial proceedings was harmless, and stating that, "[w]hen faced with gaps in the habeas statute, we have 'looked first to the considerations underlying our habeas jurisprudence, and then determined whether the proposed rule would advance or inhibit these considerations'") (citation omitted); *Duncan v. Walker*, 533 U.S.167, 183 (2001), (Justice Stevens, joined by Justice Souter, concurring) ("[f]ederal habeas corpus has evolved as the product of both judicial doctrine and statutory law" and that therefore "equitable considerations may make it appropriate for federal courts to fill in a perceived omission on the part of Congress by tolling AEDPA's statute of limitations for unexhausted federal habeas petitions.").[9]

### 3. Interpretation of the AEDPA.

The strength and length of the Court's regard for its own precedents and equitable discretion as well as statutory text has carried over to its disposition of cases arising after passage of the Antiterrorism and Effective Death Penalty Act of 1966, Pub. L. 104-132, 110 Stat. 1214 (1996) ("AEDPA").

Thus, in *Slack v. McDonald*, 529 U.S. 473, 483 (2000), the Court considered the AEDPA provision that requires a petitioner seeking appeal from a district court denial of relief to obtain a certificate of

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[9] *See also Kuhlmann v. Wilson*, 477 U.S. 436, 446 (1986), in which, speaking of the Court's decisions over the past several decades construing the reach of habeas statutes, Justice Powell's plurality opinion said that, "whether reading those statutes broadly or narrowly, the Court has reaffirmed that 'habeas corpus has traditionally been regarded as governed by equitable principles.'" (citing *Fay v. Noia*, 372 U.S. 391, 438 (1963)).

appealability ("COA") by making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The District Court had denied relief on procedural grounds, and the State contended that no appeal was permissible because the Act limited appeals to constitutional grounds. The Court rejected that narrow interpretation of the Act because the "writ of habeas corpus plays a vital role in protecting constitutional rights * * * [and] Congress expressed no intention [in the AEDPA] to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Id.* p. 483. Instead, the Court held that a COA should issue when the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* p. 484.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court ruled that a court in a habeas case must act consistently "with the objects of the statute" but also "must be guided by the general principles underlying our habeas corpus jurisdiction." *Id.* p. 554. The Court's holding was that a Court of Appeals may *sua sponte* recall its mandate "to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner" only "to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence" – a standard it recognized was "more lenient" than AEDPA's restrictions on successive petitions. *Id.* p. 558.

*See also Williams v. Taylor*, 529 U.S. 420, 432-35 (2002) (relying on pre-AEDPA case law to interpret the term "failed"); *Carey v. Saffold*, 536 U.S. 214, 227,

228 (2002) (Kennedy, J., dissenting, stating that the Court "departs from the text" of the AEDPA in giving an "expansive" definition to the term "pending"); *Stewart v. Martinez-Villareal*, 253 U.S. 637 (1998) (holding that a petitioner seeking to raise a claim previously dismissed by the District Court as premature is not raising a "second or successive" petition under § 2244(b), a ruling Justice Scalia said "flouts the unmistakable language of the statute to avoid what [the Court] calls a 'perverse' result." *Id.* p. 646 (Scalia, J. dissenting)).

### C. The AEDPA Does Not Preclude Equitable Tolling.

*Amici* bring no expertise to the question whether attorney gross incompetence warrants application of the equitable tolling doctrine in this case. They do, however, take strong issue with Respondent's statement (Opp. p. 21) that equitable tolling of the AEDPA statute of limitations is impermissible. As the Court ruled in *Young v. United States*, 535 U.S. 43, 49-50 (2002):

> It is hornbook law that limitations periods are customarily subject to equitable tolling * * * unless tolling would be inconsistent with the text of the relevant statute. * * * Congress must be presumed to draft limitations periods in light of this background principle. [Inner quotation marks and citations omitted.]

Moreover, Congress is presumed to draft with knowledge of this Court's tradition of applying

equitable principles in the exercise of its habeas corpus jurisdiction,[10] and statutes should not be construed "to displace courts' traditional equitable authority absent the clearest command * * * or an inescapable inference to the contrary." *Miller v. French*, 530 U.S. 327, 340 (2000).

Accordingly, given the Court's historic recognition of habeas corpus as governed by equitable principles, its consistent development of the breadth and limits of the writ through judicial exposition as well as statutory construction, its caution that statutes depriving courts of traditional equitable discretion must do so with pellucid clarity, and the absence of any such language in the limitations provision of the AEDPA, *amici* conclude that the Court would be acting squarely within its historic equitable exercise of habeas corpus jurisdiction if it were to adopt the equitable tolling doctrine in this case.

## CONCLUSION

The Court should hold that doctrine of equitable tolling applies in cases subject to the Antiterrorism and Effective Death Penalty Act of 1996.

Respectfully submitted,

William F. Sheehan

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[10] *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 420 (1986) ("Congress must be presumed to have been fully aware of this interpretation of the [antitrust] statutory scheme, which had been a significant part of our settled law for over half a century.").

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# AMICUS CURIAE BRIEF

(3)

No. 09-5327

Supreme Court, U.S.
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In The
# Supreme Court of the United States

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## ALBERT HOLLAND,

*Petitioner,*

v.

## STATE OF FLORIDA

*Respondent.*

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## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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# BRIEF OF LEGAL ETHICS PROFESSORS AND PRACTITIONERS AND THE STEIN CENTER FOR LAW AND ETHICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

---

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## INTEREST OF *AMICI CURIAE*[1]

*Amici Curiae* have an interest in assisting this Court in recognizing the professional ethical obligations of defense counsel to obey client instructions, communicate material information to the client, withdraw from a representation only upon notice to the client and approval by the court, and be truthful to the client, and the extraordinary circumstances that arise if counsel fails to fulfill those duties to the client and counsel's obligations to the court.

The brief of *Amici Curiae* will not address every point argued by the parties. Instead, *Amici Curiae* focus on the professional responsibility issues described above.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amici Curiae* and their counsel has made a monetary contribution to the preparation and submission of this brief. The *Amici Curiae* and their counsel are grateful to Tanya Abrams and Jason Wittlin-Cohen, Yale Law School students, for their assistance in preparing this brief.

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The views expressed herein reflect the personal opinions of *Amici Curiae* and should not be attributed to the organizations or firms with which they are associated.

## STATEMENT OF THE CASE

Uncontradicted facts establish that Petitioner, convicted of capital murder and having unsuccessfully exhausted his direct appeals, repeatedly instructed his lawyer, who was handling his state habeas petition, to preserve his right to file a federal habeas petition. Those facts also establish that Petitioner's lawyer a) solicited Petitioner's trust by repeatedly reassuring him that counsel knew the federal statute of limitations and would comply with it, (Pet. Brief at 50), b) betrayed that trust by failing to notify him of the state court decision in his case, which triggered the running of the federal statute of limitations, c) took no steps to preserve Petitioner's right to file the habeas petition, d) failed to respond to Petitioner's repeated written requests for information about the status of state proceedings, and e) lied to Petitioner about the opportunities lost as a result of counsel's systematic misconduct, (Pet. Brief at 25). The Eleventh Circuit, classifying that combination of facts as no more than "gross negligence," refused to find grounds for equitable tolling of the statute of limitations to permit Petitioner to pursue his federal habeas claim, cutting off the last avenue of relief available to Petitioner to challenge his capital conviction.

## SUMMARY OF ARGUMENT

Leaving to Petitioner and others the responsibility of presenting this Court with all the reasons why this Court should fashion a remedy that would avoid the shocking result that Petitioner should suffer the consequences of such extreme lawyer misconduct, *Amici Curiae* instead file this brief to address key issues that, by virtue of *Amici Curiae's* special background, expertise and teaching in the area of lawyer ethics and professional responsibility, might assist the Court in evaluating the lawyer's behavior in this matter.

First, *Amici Curiae* will explain a) why the misconduct of Petitioner's former counsel constitutes substantially more than "gross negligence" and, under the law governing lawyers, represents intolerable, thoroughly unacceptable behavior and b) how the Eleventh Circuit's characterization of the conduct of Petitioner's former counsel as no worse than gross negligence trivializes the extraordinary circumstances that arise when a lawyer's misconduct breaches the fundamental fiduciary duties of obedience, communication and loyalty that are owed to the client.

Second, *Amici Curiae* describe several professional responsibility concepts that govern the conduct of lawyers that this Court could use to articulate standards to guide the lower courts in distinguishing those matters in which equitable tolling should be available from those in which the Court might find it acceptable to visit the

consequences of the lawyer's misconduct upon the client.[2] These concepts are:

a) when a lawyer's misconduct is so serious that the lawyer could be subject to fee forfeiture, even in

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[2] Looking at this fact situation from a professional responsibility point of view presents a very different line of analysis from that suggested by equitable tolling jurisprudence. A lawyer who fails to notify his or her client of a key decision in the client's case and fails to take steps to file a timely pleading within the applicable statute of limitations would have breached the standard of care owed to the client. Under a professional responsibility analysis, whether the lawyer did so totally negligently by simply forgetting or by being distracted or by miscalculating the deadline or, intentionally and wantonly, by acting in total disregard of client instructions would be irrelevant. Similarly, whether the client directed the lawyer to notify the client of important matters and to take all steps necessary to protect the client or the client retained the lawyer to represent the client and gave the lawyer no further instructions, would likewise be irrelevant. Indeed, from a professional responsibility point of view, *Amici Curiae* must wonder how the client's right to file a habeas petition late on the basis of equitable tolling should turn on the diligence of the client or the characterization of the lawyer's conduct as something beyond negligence when, in the professional responsibility world, it is lawyers, not clients, who must be diligent. It is lawyers, not clients, who must keep clients informed. It is lawyers, not clients, who must file pleadings on a timely basis. And, of course, visiting the sins of the lawyer upon the client is especially inequitable where normal professional responsibility remedies, such as a malpractice claim and/or a disciplinary proceeding against the lawyer, can provide no meaningful relief from the lawyer's failures. This is particularly so here where the effect on the client – loss of the right to file a federal habeas petition – has irreparable consequences.

the absence of the client suffering actual damages,

b) when punitive damages might be available in a claim by the client against the lawyer because of the outrageous character of the lawyer's conduct, and

c) when another lawyer, with knowledge of the transgressing lawyer's serious misconduct, would be obliged under the applicable rule of professional conduct to report the lawyer's conduct to disciplinary authorities because the conduct raises a substantial question about the transgressing lawyer's honesty, trustworthiness or fitness to practice law.

## ARGUMENT

### I. The Conduct of Petitioner's Lawyer Presents Exceptional Deviations from the Lawyer's Fiduciary Obligations

*Amici Curiae* cannot fathom how the Eleventh Circuit could characterize what occurred here as a "pure professional negligence case," as if a lawyer in Mr. Collins's position were a mere messenger hired to deliver a package whenever he felt like it, with no fiduciary duties owing to the customer-client. Lawyers certainly have a duty to be competent. And, it is true, courts often view failure by a lawyer to fulfill that duty by a negligence standard – a garden variety failure to meet the standard of care – that would not give rise to an entitlement of the client to escape the damaging consequences of the lawyer's conduct. Yet that is not what happened here. There was no mere lapse in the standard of care. Rather, this Court is presented with several fundamental breaches of the most sacred duties lawyers owe their clients, duties that long pre-date any lawyer codes, duties that courts have enshrined in the foundations of agency law (the roots of much of the law governing lawyers), duties that have been only strengthened over time as the courts have applied them to the lawyer-client relationship. The Court is also confronted with a lawyer who perpetrated a fraud on the lawyer's client and at the same time abandoned the client's cause without notice or court permission.

### A. Duty of Obedience

It is not necessary for a client to tell the client's lawyer to undertake tasks essential to the successful conclusion of a representation in order for the lawyer to bear responsibility for fulfilling those tasks. Indeed, it would stand the lawyer-client relationship on its head if the only tasks a lawyer were required to undertake to fulfill the lawyer's fiduciary duties to the client were those the client demanded. It is the lawyer, by virtue of superior knowledge, skill and experience, who brings the ability to identify and to complete the tasks that must be undertaken to fulfill the objectives of the client's representation.

That having been said, there is something particularly pernicious about a lawyer who disobeys the express direction of the client. Agency law, from its earliest incarnation, obligated an agent to obey the express direction of the agent's principal and condemned the failure to fulfill that obligation. *See* Restatement (Third) of Agency §§ 1.01, 1.01 cmt. f(1), 8.01 and 8.07 (2006). *See also* Restatement (First) of Agency §§ 385(1), 385(1) cmt. a. and 385(2) (1933) (stating that an agent, including an attorney, "is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform").

As this court observed in *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000):

> We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. . . . This is so because a

> defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

(Further citation omitted.)

That condemnation, and the resulting extraordinary consequences to the disobeying agent, have become hallmarks of the law governing lawyers, enshrined in the lawyer codes as well as in the case law. *See, e.g.*, *Faretta v. California*, 422 U.S. 806, 834, 834 n.46, 836 (1975) (holding that certain fundamental decisions derive from an individual's right of self-representation, which "has been recognized from our beginnings by federal law and by most of the States"); *see also* Model Rules of Profl Conduct R. 1.2 (2009) (noting that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued"); Restatement (Third) of the Law Governing Lawyers § 22(1) (2000) (the decision to appeal in a criminal proceeding is a decision "reserved to the client"); ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function § 5.2(a) (Approved Draft 1971) (noting that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel"); ABA Standards for Criminal Justice, Prosecution Function and Defense Function § 4-5.2 (3d ed. 1983) (noting specifically

that the decision whether to appeal is one "ultimately for the accused"). In short, the failure to follow a client's lawful instructions creates the most substantial breach of the lawyer's fiduciary duty, and a breach of this duty is what clearly occurred in this matter.

It is not surprising then that courts hold lawyers responsible for any loss resulting from the failure to obey a client's orders and that lawyers who disobey can be sanctioned for such misconduct. *See, e.g., Wood v. Hollingsworth*, 603 S.E.2d 388 (N.C. Ct. App. 2004) (client stated claim for legal malpractice where allegations included failure to follow instructions to file suit, failure to notify client that lawsuit had not been filed, failure to advise client of running of the applicable statute of limitations, and failure to protect client's interests by timely filing suit); *Lieberman v. Employers Ins. of Wausau*, 419 A.2d 417 (N.J. 1980) (lawyer expressly and explicitly instructed by his client to follow certain course of action is under the duty of doing so and may be held liable for damages resulting from his failure to do so); *Martin v. State Bar of California*, 575 P.2d 757 (Cal. 1978) (lawyer suspended for two years where, inter alia, she did not implement instructions of her clients or advise them that she was unable to do so).

A lawyer's disobedience is particularly shocking and deliberate when, as here, the client, an incarcerated prisoner, has clearly repeated his instructions in the matter. Petitioner sent a letter to his lawyer on March 3, 2005 requesting that his lawyer promptly file his federal habeas petition. After failing to garner a response, he sent another letter three months later, inquiring as to the status

of his appeal. The lawyer's utter failure to respond in any manner to these two separate communications over a three-month period cannot be characterized as mere negligence.[3] Instead, the failure manifested the lawyer's willful disregard of the lawyer's promises and the client's express direction.

### B. Duty to Communicate

Similarly, it is not the client's obligation to seek communication from the lawyer. It would completely reverse the nature of the agent-principal relationship if the agent were only required to communicate when the principal sought information. Again, from the very origins of the common law of agency, the duty to communicate with the principal has been at the center of the fiduciary duties agents owe principals. *See Baker v. Humphrey*, 101 U.S. 494, 500 (1880) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."); *dePape v. Trinity Health Sys., Inc.*, 242 F. Supp. 2d 585, 611 (N.D. Iowa 2003) (recognizing the importance of the duty to communicate and inform one's client); *Hart v. Comercia Bank*, 957 F. Supp. 958, 981-82 (E.D. Mich. 1987) (noting that the "[Michigan Rules of Professional Conduct] impose[] *rigorous duties* on a

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[3] It only adds insult to injury that the Petitioner, because of his lawyer's abandonment of him, sent a final letter on January 9, 2006, again demanding an update on the status of his appeal, not realizing that the statute of limitations had run a mere two weeks earlier.

lawyer regarding the breadth of advice and communication with which he or she should provide a client") (emphasis added); *United States v. Bowers*, 517 F. Supp. 666, 671 (W.D. Pa. 1981) (recognizing that when a lawyer fails to communicate with his client he "violates the *fundamental* duty of undivided loyalty") (emphasis added).

And, as with the duty of obedience, the duty to communicate has become a hallmark of the lawyer codes, as well as a centerpiece of the case law addressing the lawyer's fiduciary duties vis-à-vis the lawyer's client. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.4(a) ("A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; [and] (4) promptly comply with reasonable requests for information . . ."). Not surprisingly, the failure of a lawyer to fulfill this duty is not treated as a minor transgression, but rather as a frontal assault on the lawyer-client relationship.

For two reasons it is hard to imagine a more deplorable disregard of the lawyer's duty to communicate than that which occurred here. First, the client did not rely passively on the lawyer to fulfill the obligation; he repeatedly asked the lawyer to monitor this case and notify him when the state court rendered its decision. While the lawyer's duty to the client was not enhanced as a result of the client's request – the duty being absolute as to such

a critical event – the failure to act in the face of repeated client entreaties manifests the lawyer's disregard of the client's interests that equity must rectify when legal remedies are inadequate.

Second, the client's need to hear from the lawyer could not be more critical. The client is on death row. The client may be about to exhaust any opportunity for collateral relief in state court. The client has only 14 days to file a federal habeas petition from the date state relief is denied. And, finally, this is the condemned's last chance to gain any relief from a sentence of death. Again, to characterize Mr. Collins's failure as simple negligence – or even gross negligence – understates the magnitude of the lawyer's misconduct and the potentially tragic consequences of the lawyer's lapse.

### C. Misrepresentation by Omission

Lawyers are prohibited from making knowing misrepresentations to third parties. No matter how benign the result is viewed, Rules 3.3, 4.1, and 8.4(c) of the Model Rules of Professional Conduct, rules universally adopted in the United States, make this prohibition clear. As officers of the court with special responsibilities, lawyers are absolutely prohibited from lying and the damage caused by the lie is immaterial to the absolute rule. But when a lawyer lies to a client, the prevarications come at the expense of the very person to whom the lawyer owes fiduciary duties, including the affirmative duty to communicate in order to keep the client "reasonably informed about the status of the matter." Model Rules of Prof'l Conduct R. 1.4(a)(3).

In the view of this affirmative duty, Mr. Collins's multiple failures to respond to any of Mr. Holland's requests for information constitute fraud by omission. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980) ("[O]ne who fails to disclose material information . . . commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'"). The Restatement (Second) of Torts has long recognized that, where a fiduciary relationship exists, "[o]ne who fails to disclose to another a fact that he knows may justifiably induce the other to act or to refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose." Restatement (Second) of Torts § 551. The Restatement's reference to "business transactions," *a fortiori* contemplates client-lawyer relationships. *Id.*; Restatement (Third) of the Law Governing Lawyers § 56 cmt. f; *see also* Ronald E. Mallen & Jeffrey M. Smith, 1 *Legal Malpractice* § 8:10 (2009) ("When committed by an attorney, the tort of fraud or deceit is determined essentially by the same rules that apply to any defendant.").

Mr. Holland's counsel failed to communicate to his client that his appeal had been denied by the Florida Supreme Court and that the mandate had issued, triggering the time in which a timely habeas petition needed to be filed. That failure constituted a representation that those critical events had not

yet occurred. Mr. Holland relied (and in fact had no choice but to rely)[4] to his detriment on these representations and accordingly missed the statutory deadline. Mr. Holland's case is, therefore, far from a "pure professional negligence case," the terms by which the Eleventh Circuit characterized it. Mr. Collins's grossly negligent conduct amounted to fraud and constitutes "extraordinary circumstances" warranting equitable tolling relief.

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[4] The conduct of Mr. Holland's lawyer, whether characterized as a failure to communicate, a failure to obey, or as fraud, is all the more injurious since the Florida court prevented Mr. Holland from dismissing the lawyer and proceeding *pro se*. In doing so, the Florida court affirmatively hindered Mr. Holland's access to court. While prisoners do not have the right to counsel for habeas petitions, they retain an autonomy interest in pursuing access to the courts. This Court has suggested that, or at least reserved the question whether, such conduct might constitute "special circumstances" warranting equitable tolling. In *Lawrence v. Florida*, 549 U.S. 327 (2007) (holding lawyer miscalculation of deadline not sufficient to warrant equitable tolling in the post-conviction context), this Court concluded the mere fact of state court assistance in post-conviction proceedings does not make the state accountable for delay. In reaching this conclusion, the Court noted that the prisoner-petitioner "has *not* alleged that the State *prevented him* from hiring his own attorney or *from representing himself*." *Id.* at 337 (emphasis added). In *Holland*, as distinguished from *Lawrence*, the Florida court did in fact prevent Mr. Holland from representing himself. The Florida court forced Mr. Holland to rely to his detriment on his appointed counsel. State action thus compounded the lawyer's gross negligence, misrepresentation by omission, and fraudulent conduct. Such frustration of Mr. Holland's efforts to file a timely federal habeas petition rises to the level of "extraordinary circumstances" and justifies equitable tolling.

### D. Abandonment of the Client

It is clear that Petitioner's counsel took on the representation of Petitioner through federal habeas. *See* Fla. Stat. § 27.711(2) (2005). Mr. Collins explicitly promised Mr. Holland that he would "enforce [Mr. Holland's] substantive and procedural constitutional rights to the fullest extent of the law" and asked for Mr. Holland's "complete confidence and support as we litigate your case to the state and federal trial and appellate courts." Joint Appendix at 62. Under these circumstances, Mr. Collins, in his role as an officer of the court as well as in his role as Petitioner's lawyer had absolute obligations: before taking any steps to withdraw and leaving his client in the lurch – even if he had the most compelling reasons to withdraw (as opposed to the instant situation where he had none) – Mr. Collins was required both to notify the client and to seek the permission of the court to withdraw.

Rule 4-1.16 of the Florida Rules of Professional Conduct provides in no uncertain terms:

> (c) Compliance With Order of Tribunal.
>
> . . . When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Protection of Client's Interest.
>
> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a

> client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. . . .

Fla. Rules of Prof'l Conduct R. 4-1.16.

The reasons for these rules are manifest. First, the general requirement is that a lawyer "should not accept a representation in a matter unless it can be performed competently, without conflict of interest and to completion." Model Rules of Prof'l Conduct R. 1.16 cmt. [1]. Clients are entitled to rely on that principle – as Petitioner clearly did here – particularly since his counsel's commitment was stated so explicitly and in writing. Second, any right to withdraw under the rule can always be trumped by the court's authority to order the lawyer to continue the representation. Ann. Model Rules of Prof'l Conduct R. 1.16 annot. subsec. (c) at 247 (2007); *see, e.g., In re Disciplinary Action Against Fuller*, 621 N.W.2d 460 (Minn. 2001) (court permission required to withdraw in case of alleged client fraud). Third, no matter how justified the withdrawal might be, it must be accomplished in a way that protects the client's interests. Among the most important steps the lawyer must take, the lawyer must "provide reasonable notice to the client that withdrawal is imminent," Ann. Model Rules of

Profl Conduct R. 1.16 annot. subsec. (d) at 250, so that the client can protect his or her interests, including opposing or seeking conditions on the lawyer's withdrawal.

In the case of Petitioner's counsel all these safeguards were honored in their breach. Petitioner received no notice that his lawyer was abandoning him, Petitioner's counsel ignored the requirement that he seek permission of the court, and Petitioner had no opportunity to protect himself in a timely way. To compound these indignities, Respondent now asserts that Petitioner, who was the victim of this aggressive rule-breaking, is somehow responsible for the blatant misconduct of his fleeing lawyer, fleeing that took place out of Petitioner's view.

The courts describe the misconduct that this case presents in terms of "client abandonment." *See, e.g., People v. Smith*, 93 P.3d 1136 (Colo. O.P.D.J. 2004) (relying on ABA Standards for Imposing Lawyer Sanctions for a rule that lawyer neglect rising to the level of abandonment warrants sanction). Courts have recognized that such misconduct seriously calls into question the lawyer's fitness to practice law. Misconduct that affects imprisoned clients who have a great deal at stake is deemed particularly egregious. *See In re Riggs*, 240 F.3d 668, 671 (7th Cir. 2001) ("Abandonment of one's (imprisoned) client in a criminal case is one of the most serious offenses a lawyer can commit.").

Florida courts follow the general trend of sanctioning, and at times disbarring, lawyers who abandon their clients. *See, e.g., Florida Bar v.*

*Setien*, 530 So. 2d 298 (Fla. 1988) (lawyer disbarred for ethical violations including repeatedly ignoring clients and ultimately abandoning law practice without notifying them); *see also People v. Whiting*, 539 P.2d 128 (Colo. 1975) (lawyer disbarred for closing his office and leaving community without advising his clients, acts constituting mass abandonment of the interests of his entire clientele, unprofessional conduct and gross negligence); *Walker v. State Bar*, 783 P.2d 184 (Cal. 1989) (disbarment warranted for lawyer who abandoned his practice, disregarded the interests of clients, and failed to communicate with them).

Even where a lawyer has not entirely abandoned his law practice, failure to timely file documents on a client's behalf and failure to keep the client informed about the status of the case constitute instances of abandonment that call for discipline. *See, e.g.*, *Florida Bar v. Williams*, 753 So. 2d 1258 (Fla. 2000) (failing to file documents on client's behalf and failing to maintain adequate contact with client, among other ethical violations, warranted one-year suspension); *Florida Bar v. Roberts*, 770 So. 2d 1207 (Fla. 2000) (lawyer's failure to keep client reasonably informed of the status of her representation and to explain matter to client to extent reasonably necessary to permit client to make informed decision warranted 91–day suspension); *Florida Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999) (lawyer suspended for six months for misrepresentations to client regarding status of lawsuit, failure to act with reasonable diligence to file the lawsuit, and failure to communicate with the client); *Florida Bar v. Jordan*, 705 So. 2d 1387 (Fla. 1998) (lawyer who allowed client's case to be

dismissed for lack of prosecution, failed to respond to client's attempts to communicate with him, and failed to inform client of dismissal of case violated state rules of professional conduct requiring competence, diligence, and communication with client and suspended for one year); *Florida Bar v. Knowles*, 534 So. 2d 1157 (Fla. 1988) (lawyer suspended for at least 3 years where, in addition to other misconduct, lawyer neglected legal matters, failed to return client phone calls, and failed to properly advise client of status of proceeding); *Florida Bar v. Patterson*, 530 So. 2d 285 (Fla. 1988) (lawyer suspended for one year, where, besides other disciplinary matters, lawyer failed to communicate with clients); *Florida Bar v. Neale*, 432 So. 2d 50 (Fla. 1983) (lawyer suspended for sixty days plus three years probation where lawyer failed to keep client advised at all times).

Given the foregoing, one can see that the exceptional conduct of abandonment that occurred here goes far beyond gross negligence, representing such a lapse in the fulfilling of fiduciary duties as to warrant severe discipline of the lawyer involved, a circumstance demonstrating yet again how the facts here cry out for equitable tolling.

## II. The Law Governing Lawyers Provides Standards for Identifying Exceptional Circumstances

In light of this demonstration of the seriousness of the misconduct of Petitioner's lawyers, how can the Court find standards in the law governing lawyers to determine when equitable tolling would be an appropriate remedy? *Amici*

*Curiae* suggest that there are three different bodies of professional responsibility law that draw instructive distinctions, all of which support concluding that equitable tolling should be recognized in the present matter.

### A. Forfeiture of Fees

The law governing forfeiture of a lawyer's fees for ethical misconduct is particularly instructive. Section 37 of the Restatement (Third) of the Law Governing Lawyers provides that a lawyer who commits a "clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter." *See* Restatement (Third) of the Law Governing Lawyers § 37. Comment d observes that "[f]orfeiture is generally inappropriate when the lawyer has not done anything willfully blameworthy," *id.* at § 37 cmt. d, and refers to section 469 of the Restatement (Second) of Agency, which clearly provides that disobedience or disloyalty are a basis for forfeiture:

> An agent is entitled to *no compensation* for conduct which is deemed disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.

Restatement (Second) of Agency § 469 (1958) (emphasis added). The Restatement (Second) of Agency is so strict in matters of disloyalty and disobedience that it provides that an agent is entitled to no compensation, even if disobedience results in no substantial harm to the principal's interests and even where the agent believes he was justified in his actions. *Id.* at § 469 cmt. a.

Section 37 of the Restatement (Third) of the Law Governing Lawyers similarly recognizes fee forfeiture in every case of a clear and serious violation of a client's interest. It considers the gravity, timing, willfulness, and actual or threatened harm to the client to determine the extent of the forfeiture. Of course, the conduct here – willful and repeated disregard of an express direction to preserve appellant's federal habeas rights – meets all of these tests. On the questions of gravity of the offense and actual harm to the client there could be no more serious transgressions.

A lawyer's failure to keep his client apprised of the status of his matter – whether or not he has been expressly asked to do so – also should justify fee forfeiture. Both the Restatement (Third) of the Law Governing Lawyers § 20 ("a lawyer must keep a client reasonably informed about the matter" and must "promptly comply with reasonable requests for information"), and the Restatement (Second) of Agency § 381 ("an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the *principal would desire to have* . . .") (emphasis added)), underscore the importance of this duty.

Several jurisdictions have adopted the Restatement's view that failure to keep a client informed and failure to respond to requests for information justify professional discipline. For example, in *State ex rel. Oklahoma Bar Assoc. v. O'Brien*, 611 P.2d 650 (Okla. 1980) a lawyer's failures to inform a client that he had lost his trial and appeal, or to leave a forwarding address, which resulted in additional costs for the client, justified the lawyer's indefinite suspension from the practice of law. Similarly, in *Vollgraff v. Block*, 458 N.Y.S.2d 437 (N.Y. Sup. Ct. 1982), the court held that the failure to inform a client of his firm's dissolution violated his duty of communication to his client. Finally, *Crean v. Chozick*, 714 S.W.2d 61 (Tex. Ct. App. 1986), held that the failure of a lawyer to disclose his own malpractice tolls the statute of limitations to bring a malpractice claim.

This matter is in many ways similar to *O'Brien*. In both cases, the lawyer failed to inform his client of the status of his appeal, resulting in significant consequences for the client. However, the lawyer's conduct here was more egregious because: a) he failed to respond to an express request for information and b) the consequence of his failure to communicate may result in the loss of the defendant's final opportunity to challenge his death penalty conviction, rather than a mere financial loss.

*Crean* evidences the extreme importance of the duty of communication in its holding that a lawyer's failure to inform his client of his *own malpractice* tolls the statute of limitations on the claim. Thus, the duty to communicate is so essential to the nature of the lawyer-client relationship and

the loyalty owed to the client that the lawyer is expected to communicate his own errors, even when it may result in criminal, civil, or reputational costs to the lawyer. Section 20 of the Restatement (Third) of the Law Governing Lawyers adopts the same view, stating that a lawyer must disclose any "substantial malpractice claim." Restatement (Third) of the Law Governing Lawyers § 20. The example referenced in comment c of section 20 of the Restatement (Third) of the Law Governing Lawyers is particularly relevant here:

> For example, a lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw.

Restatement (Third) of the Law Governing Lawyers § 20 cmt. c.

In this matter, the lawyer's failure to perform his duty to consult with his client rose above the level of mere negligence and even gross negligence. His conduct evidenced disobedience of his client's express demands, disloyalty to his client, and indeed, a willful disregard for the client's interests. The record indicates the lawyer's complete lack of due diligence in this matter. He had many opportunities to respond to the client's direct requests and ample time to file the federal habeas petition. The lawyer's failure to do either represented a willful disregard of the client's interests serious enough to justify fee forfeiture, if any had been paid. The gravity of this wrong similarly constitutes an extraordinary

circumstance that justifies equitable tolling of the statute of limitations.

### B. Availability of Punitive Damage Claim

Another way to measure the seriousness of the lawyer's misconduct is to ask whether the law governing lawyers would permit a claim for punitive damages under these circumstances. Claims for punitive damages by clients vis-à-vis their lawyers are awarded rarely and only in the most exceptional cases. Several courts have held that a lawyer's failure to communicate with his client regarding the status of his case or to file within the statute of limitations may justify the allowance of punitive damages, resting their decisions upon a determination that the conduct rose above the level of gross negligence to willful misconduct *or* a callous indifference to the client's interests. This position is consistent with section 908 of the Restatement (Second) of Torts, which states that, while conduct must be outrageous to justify punitive damages, it need not be willful. It is sufficient that the actions "are done with reckless indifference to the rights of others." *Id.* at § 908 cmt. b.

For example, in *Patrick v. Ronald Williams, Prof'l Ass'n*, 402 S.E.2d 452, 460 (N.C. Ct. App. 1991), the court held that plaintiffs were entitled to submit to the jury a claim for punitive damages in a malpractice case where the lawyers, among various other misconduct, "failed to disclose the entry of judgment for more than six months . . . ." The court reasoned that while not every legal malpractice claim supports a claim for punitive damages:

> Where, as here, plaintiffs offer evidence that defendants engaged in a repeated course of conduct which constituted a callous or intentional indifference to the plaintiffs' rights, the plaintiffs have made out a claim for punitive damages.

*Id.* at 460.

In *Metcalfe v. Waters*, 970 S.W.2d 448, 452 (Tenn. 1998), the Supreme Court of Tennessee held that a lawyer's failure to "keep [his clients] informed about the status of their lawsuit" as well as failure to "take any actions in an effort to preserve the [plaintiffs] right of appeal," among other failures, constituted a gross deviation from the applicable standard of care, rather than mere negligence, and thus supported a finding of punitive damages. And the Supreme Court of Kentucky concluded in *Bierman v. Klapheke*, 967 S.W.2d 16, 20 (Ky. 1998), that a lawyer's "acts of lying to conceal his neglect caused significant delays in the ultimate collection" by the client of the malpractice award, which warranted "a claim for punitive damages . . . ."

The Supreme Court of Delaware, in *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990), recognized that ordinary negligence will not suffice to support a claim of punitive damages, but that "intentional or willful conduct with reckless disregard for the interests of a client" may do so. Similarly, *Swinehart v. Turbin*, No. 82 C 2311, 1985 WL 1284, at *3 (N.D. Ill. May 2, 1985), held that under Illinois law, punitive damages are appropriate when torts are committed with "such gross

negligence as to indicate a wanton disregard of the rights of others."

Mr. Collins's failure to respond to any of the Petitioner's requests for information as to the status of his appeal, or to promptly file his federal habeas petition, violated his duties of communication and loyalty to his client, and evidenced a willful disregard of Petitioner's interests as well as constituting disobedience of Petitioner's express, and quite reasonable, demands.

As the courts in *Patrick* and *Metcalfe* held, the failure to keep one's clients informed or to preserve a client's rights of appeal, when analyzed holistically in the context of the entire representation, may support a finding that the lawyer acted with willful or reckless disregard of his client's interests – and not merely negligently. Mr. Collins's repeated failure to respond to his client's requests for information over a three-month period and his failure to file a habeas petition despite having ample time to do so are sufficient bases to conclude that he either acted willfully to harm the Petitioner or in reckless disregard of the interests of Petitioner, in such a way that punitive damages would be an available remedy in a legal malpractice case against Mr. Collins. And if the punitive damage standard is applied to determine whether equitable tolling should be available here, the answer should also be affirmative.

### C. Required Reporting of Lawyer Misconduct

An additional body of law that provides a means to measure the exceptional nature of the transgressions of counsel for Mr. Holland asks the question whether a lawyer in Florida, knowing of the uncontradicted facts of this representation, would be required to report Mr. Collins to the Florida Bar disciplinary authorities. Such a non-discretionary duty has been imposed on lawyers because "self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct," Fla. Rules of Prof'l Conduct R. 4-8.3 cmt. at ¶ 1. The applicable rule "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent." *Id.* at R. 4-8.3 cmt. at ¶ 3.

In Florida, the Rule itself provides in applicable part:

> **(a) Reporting Misconduct of Other Lawyers.** A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

*Id.* at R. 4-8.3.

Can there be any doubt that the conduct of Petitioner's counsel would trigger a reporting obligation under this rule? Mr. Collins was dishonest in that he promised his client certain undertakings and fulfilled none of them. Similar dishonesty is found in his fraud by silence in lulling his client into a false state of security that no decision had come down and, therefore, no statute of limitations was running. Finally, he was dishonest when his misconduct was revealed and he falsely informed his client (his client!) that the statute had long since run, even before his state habeas petition was filed.

Similarly, Mr. Collins demonstrated how untrustworthy he was not only in his catalogue of misrepresentations, but also by failing to act in a timely manner to obey his client's instructions, failing to communicate with his client the information the client needed to protect himself if his lawyer were to abandon him, and failing to file a habeas petition within the time that remained under the applicable statute. Needless to say, each and all of the foregoing raised a substantial question of the fitness of Mr. Collins to practice law.

The case of *In re Reihlmann*, 891 So.2d 1239 (La. 2005), reflects how the standard should be applied. In *Reihlmann*, a lawyer waited five years to disclose to anyone information he had learned from a prosecutor-friend that the latter had suppressed exculpatory blood evidence, long after the offending lawyer had passed away. The non-reporting lawyer was publicly reprimanded for failing to report, as would, in view of the *Amici Curiae*, any lawyer with knowledge of these uncontradicted facts who failed

to report Mr. Collins's conduct here. Exceptional circumstances exist when a lawyer's conduct demonstrates dishonesty, untrustworthiness or lack of fitness to practice law, a standard that could be easily applied to the conduct of Petitioner's counsel to more than justify providing Petitioner the relief he now seeks by way of equitable tolling.

## CONCLUSION

This matter presents this Court with a litany of reprehensible conduct by a lawyer that is only compounded by the dramatic consequences that might befall the unfortunate client who suffered these exceptional indignities. Fortunately, such conduct is as rare as it is deplorable. As a result, in the view of *Amici Curiae*, looking at this from a professional responsibility perspective, the Court should conclude that the lawyer's failure to respond to and implement the client's request to file a federal habeas corpus petition presents extraordinary circumstances that warrant equitable tolling of the statute of limitations to give Petitioner one full opportunity for federal collateral review.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 09-5327

# In The
# Supreme Court of the United States

ALBERT HOLLAND, PETITIONER

*v.*

STATE OF FLORIDA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

**BRIEF OF TEXAS, ALABAMA, COLORADO, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT**


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In The
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**BRIEF OF TEXAS, ALABAMA, COLORADO, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT**

## INTEREST OF AMICI CURIAE

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year statute of limitations for state prisoners filing federal habeas petitions, and dictates how this limitations period is started, restarted, and tolled. See 28 U.S.C. 2244(d). Petitioner Albert Holland argues that federal courts can modify AEDPA's detailed timing rules through the exercise of equitable power. Judicial interference with this legislative scheme deprives amici States of benefits AEDPA was intended to bestow: reduction of delay, protection of finality of state court convictions, and conservation of criminal-justice resources. Seeking to preserve benefits conferred upon them by Congress, 22 amici States respectfully submit this brief in support of respondent Florida.

## SUMMARY OF ARGUMENT

Statutes of limitations are customarily subject to equitable tolling, but this Court respects the role of Congress in deciding whether a given limitations period is subject to judicially crafted exceptions. Where there is good reason to believe Congress did not want equitable tolling to apply, courts must honor that wish. AEDPA evinces such an intent to exclude judicial participation, as demonstrated by its detailed rules governing the timing of federal habeas petitions by state prisoners. Accordingly, AEDPA's statute of limitations is not subject to equitable tolling. To hold otherwise denies benefits to the States that Congress intended to confer.

## ARGUMENT

### The AEDPA Statute Of Limitations Is Not Subject To Equitable Tolling

Petitioner's question presented does not directly inquire whether equitable tolling is compatible with the statute of limitations in 28 U.S.C. 2244(d). See Pet. i; cf. *Lawrence* v. *Florida*, 549 U.S. 327, 336 (2007) (noting open question); *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005) (same). To grant petitioner's desired relief, however, the Court would have to answer that antecedent question in the affirmative. If the Court reaches the issue, which is fairly included within the question presented, Sup. Ct. R. 14.1(a), it should hold that AEDPA's statute of limitations is not subject to equitable tolling.

### A. Statutes Of Limitations Are Not Subject To Equitable Tolling Where There Is Reason To Believe Congress Did Not Want Equitable Tolling To Apply

Any inquiry into equitable tolling must be guided by the statute of limitations Congress has enacted. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008); *Bowen* v. *City of New York*, 476 U.S. 467, 480 (1986); *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 559 (1974); *Honda* v. *Clark*, 386 U.S. 484, 500 (1967); *Burnett* v. *N.Y. Cent. R.R.*, 380 U.S. 424, 426 (1965). This is not to contradict the "hornbook law that limitations periods are customarily subject to equitable tolling," but rather to acknowledge that courts cannot rewrite limitations periods in a manner "inconsistent with the text of the relevant statute." *Young* v. *United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted).

In interpreting a statute of limitations, courts apply a "rebuttable presumption of equitable tolling," *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), so long as the limit is not jurisdictional, see *Bowles* v. *Russell*, 551 U.S. 205, 214 (2007). Rebuttal of this presumption depends on a sensible question: "Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (referring to this as "*Irwin*'s question").

This Court asks *Irwin*'s question when a party asserts that a particular statute of limitations is subject to equitable tolling. In *Brockamp*, 519 U.S. at 348, the Court rejected a request for equitable tolling of a three-year limitations period under 26

U.S.C. 6511 for filing tax-refund claims. In contrast to typical statutes of limitations, which "use fairly simple language" that "can often plausibly [be] read as containing an implied 'equitable tolling' exception," Section 6511 "set[] forth its limitations in a highly detailed technical manner." *Brockamp*, 519 U.S. at 350. The Court's examination of the statute demonstrated that equitable tolling could not apply:

> Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counter-indications.

*Id.* at 352. Concluding that "Congress did not intend the 'equitable tolling' doctrine to apply to § 6511's time limitations," the Court reversed decisions that had tolled that statute of limitations on account of taxpayers' senility and alcoholism. *Id.* at 354.

Similarly, the Court held in *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998), that a twelve-year statute of limitations in the Quiet Title Act (QTA), 28 U.S.C. 2409a(g), was not subject to equitable tolling. This limitations period did not begin to run until the plaintiff knew or should have known of her claim, leading the Court to conclude that the QTA "already effectively allowed for equitable tolling." *Beggerly*, 524 U.S. at 48. "Given this fact, and the unusually generous nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted." *Id.* at 48-49.

These decisions establish that Congress can rebut the presumption of equitable tolling by enacting timing rules that displace judicial participation. In *Brockamp*, a statute's detailed rules and exceptions did not admit of supplementation by courts. In *Beggerly*, equitable tolling was largely duplicative of what the statute of limitations provided. In both cases, equitable tolling was at odds with the statute of limitations, and therefore disallowed.

### B. There Is Reason To Believe Congress Did Not Want Equitable Tolling To Apply To AEDPA's Detailed Statute Of Limitations

AEDPA imposed a novel limitations period for federal habeas petitions filed by state prisoners. *Mayle* v. *Felix*, 545 U.S. 644, 654 (2005); Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1215 (6th ed. 2009). From 1867, when Congress gave the first general grant of federal habeas jurisdiction to inquire into detentions pursuant to state law, see Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, until AEDPA was signed into law in 1996, there was no statute of limitations for collateral attacks on state court convictions. Former Federal Habeas Rule 9(a), which embodied the equitable doctrine of laches, constituted the only pre-AEDPA time limit.[1] See

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[1] See Rule 9(a), Rules Governing Section 2254 Cases in the United States District Courts, Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334, reprinted in 28 U.S.C. 2254 (2000). Rule 9(a) was "deleted as unnecessary in light of the applicable one-year statute of limitations" added by AEDPA. See Committee Notes on Rules—2004 Amendment, 28 U.S.C. 2254 (2006).

*Day* v. *McDonough*, 547 U.S. 198, 214-215 (2006) (Scalia, J., dissenting); *Lonchar* v. *Thomas*, 517 U.S. 314, 322-332 (1996).

AEDPA replaced this permissive, unstructured, judicially driven approach with a detailed set of timing rules, featuring a "1-year period of limitation [for] an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. 2244(d)(1). AEDPA's one-year clock starts to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). Certain enumerated circumstances serve to restart the AEDPA clock, providing a fresh year in which to file a federal habeas petition. The clock restarts where a State creates an impediment to filing a federal habeas petition in violation of federal law, 28 U.S.C. 2244(d)(1)(B); where this Court recognizes a new constitutional right that applies retroactively to cases on collateral review, 28 U.S.C. 2244(d)(1)(C); or where a diligent petitioner discovers the factual predicate of a new claim, 28 U.S.C. 2244(d)(1)(D). In addition, the AEDPA clock is statutorily tolled while a properly filed state habeas petition is pending. 28 U.S.C. 2244(d)(2).

Petitioner and his amici contend that courts should not consider themselves bound by these timing rules, but should instead extend the time for filing federal habeas petitions when equity so requires. Pet'r Br. 36-39; ACLU Amicus Br. 5-32; Legal Historians Amicus Br. 13-14. But cf. *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam) ("Procedural requirements

established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants."). Under the equitable tolling precedent described in Part A, *supra*, the Court should ask whether there is good reason to believe Congress did not want AEDPA's statute of limitations subjected to equitable tolling. The statute's text and purpose reveal that AEDPA does not admit of equitable tolling.[2]

The AEDPA clock operates according to a detailed set of statutorily enumerated rules. See 28 U.S.C. 2244(d)(1)(A)-(D), 2244(d)(2). One wonders why Congress would bother drafting such rules if it intended judges to set them aside on an ad hoc basis. As Judge Boudin has noted:

> [S]ection 2244(d) comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort. AEDPA reflects Congress' view that the courts were being

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[2] In holding to the contrary, some courts of appeals have ignored this Court's equitable tolling decisions, relying instead on the following logical fallacy: If a limitations period is jurisdictional, then it cannot be equitably tolled. AEDPA's limitations period is not jurisdictional. Therefore, AEDPA's limitations period can be tolled. See, *e.g.*, *Smith* v. *McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam); *Davis* v. *Johnson*, 158 F.3d 806, 810-811 (5th Cir. 1998); *Miller* v. *N.J. State Dep't of Corrs.*, 145 F.3d 616, 617-618 (3d Cir. 1998); *Miller* v. *Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

> too generous with habeas relief and that the whole system needed to be tightened up.

*David* v. *Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (citation omitted). AEDPA thus stands in contrast to the relatively simple statutes of limitations in petitioner's appendix. Pet'r Br. App. 1-16.[3] The level of detail used to define AEDPA's limitations period suggests that Congress rejected the background principle of equitable tolling when it enacted the statute. See *Brockamp*, 519 U.S. at 350-353. See also *Who is on Trial? Conflicts Between the Federal and State Judicial Systems in Criminal Cases: Hearing on H.R. 3777 Before the Gov't Info., Justice, and Agric. Subcomm. of the H. Comm. on Gov't Operations*, 100th Cong. 51-53 (1988) (statement of Paul G. Cassell, Associate Deputy Att'y Gen.) (explaining that AEDPA-like habeas reform legislation proposed by the Department of Justice, which imposed detailed timing rules very similar to

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[3] See, *e.g.*, Clayton Act, 15 U.S.C. 15b ("Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action accrued."); Torture Victim Protection Act, § 2(c), 28 U.S.C. 1350 note (2006) ("No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."); Railway Labor Act, 45 U.S.C. 153(r) ("All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."); Jones Act, 46 U.S.C. 30106 ("Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose.").

those later codified in 28 U.S.C. 2244(d), "covered every exception which we feel is necessary").

AEDPA's comprehensive rules for restarting and tolling the one-year limitations period cover much of the space that equitable tolling might otherwise occupy. As Judge Posner has noted:

> [S]ection 2244(d)(1) already contains an equitable-tolling provision, subsection (D), which postpones the running of the one-year limitation for the filing of a petition for habeas corpus to "the [earliest] date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Given this and other express tolling provisions (28 U.S.C. §§ 2244(d)(1)(B), (C), (2)), it is unclear what room remains for importing the judge-made doctrine of equitable tolling * * * .

*Taliani* v. *Chrans*, 189 F.3d 597, 598 (7th Cir. 1999). It is difficult to imagine why Congress would go to the trouble of codifying timing rules that a court could just as easily apply by way of standard equitable tolling practice — unless that codification was intended to take the place of a more expansive and open-ended doctrine grounded in equity. See *Beggerly*, 524 U.S. at 48-49.

Amicus curiae ACLU disputes the assertion that Sections 2244(d)(1)(B) and 2244(d)(1)(D) are statutory substitutes for equitable tolling. According to ACLU, these provisions are statutes of repose that impose a one-year cap on petitioners who seek equitable tolling due to a state-created impediment or newly discovered evidence. See ACLU Amicus Br. 13-18. This interpretation does not withstand

scrutiny. A one-year statutory cap would be redundant, because a petitioner who sits on his claim for an entire year after escaping a filing impediment or discovering new evidence will be denied equitable tolling for want of diligence. Moreover, ACLU fails to explain why Congress would cap the most egregious equitable tolling scenarios — those involving victims of unconstitutional state impediments — but allow all other petitioners unfettered access to the courts, including those whose tardiness was caused by negligence.

That Congress would object to equitable tolling of AEDPA's limitations period is also apparent from the purpose of that provision. From 1867 to 1996, legislative silence left the judiciary to guard against dilatory filing of federal habeas petitions by state prisoners. See *Lonchar*, 517 U.S. at 323. The courts did nothing in that regard, aside from applying equitable laches principles under former Federal Habeas Rule 9(a), and delay was the natural consequence. See, *e.g.*, *Day*, 547 U.S. at 215 (Scalia, J., dissenting) (noting that "lower courts regularly entertained petitions filed after even extraordinary delays," and recounting delays of 24, 36, and 40 years); *Heflin* v. *United States*, 358 U.S. 415, 420 (1959) (Stewart, J., concurring) ("[I]n habeas corpus, there is no statute of limitations [and] the doctrine of laches is inapplicable."); *United States* v. *Smith*, 331 U.S. 469, 475 (1947) ("[H]abeas corpus provides a remedy * * * without limit of time.").

The long delays during this period of judicial oversight elicited an implicit repudiation from Congress, in the form of AEDPA. See *Mayle*, 545 U.S. at 662 (noting that Congress "adopted a tight

time line" in Section 2244(d) "to advance the finality of criminal convictions"); *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001) (noting that Section 2244(d)(1) "reduces the potential for delay on the road to finality"). To read AEDPA as an invitation to inter-branch collaboration, whereby the judiciary supplements the legislature's timing rules through equitable tolling, is to ignore the historical context from which the statute emerged. Congress appropriately displaced judge-made timing rules by enacting AEDPA, and the federal courts should abide by that decision. Cf. *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) ("[J]udgments about the proper scope of the writ are 'normally for Congress to make.'" (quoting *Lonchar*, 517 U.S. at 323)).[4]

There consequently is good reason to believe Congress did not want AEDPA's statute of limitations subjected to equitable tolling. In line with its precedent, this Court should therefore hold that 28 U.S.C. 2244(d) cannot be equitably tolled.

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[4] ACLU suggests in a footnote that the proposed interpretation of 28 U.S.C. 2244(d)(1) may violate the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. See ACLU Br. 10 n.8. Constitutional avoidance is not a serious concern here, because the statute of limitations in question applies only to state prisoners seeking postconviction review. See Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1238-1239 (6th ed. 2009) (explaining why a petitioner complaining of state custody pursuant to a criminal conviction lacks a constitutional right to federal habeas review).

### C. Equitable Tolling Of AEDPA's Statute Of Limitations Frustrates Congress's Intent To Relieve States Of Significant Burdens

Congress enacted AEDPA to limit delays, expedite the finality of state court judgments, and conserve limited state criminal-justice resources. See, *e.g.*, *Day*, 547 U.S. at 205-206; *Duncan*, 533 U.S. at 179. Equitable tolling of the limitations period in 28 U.S.C. 2244(d) impedes these worthwhile goals.

Equitable tolling, which by definition prolongs habeas proceedings beyond the bounds defined by AEDPA, inappropriately delays resolution of a petitioner's claims. Litigation concerning equitable tolling is fact-intensive and case-specific, and therefore takes a great deal of time. See, *e.g.*, *Alexander* v. *Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002) (per curiam) ("Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate."). If AEDPA is subject to equitable tolling, a petitioner has only to allege facts that would entitle him to such relief to receive an evidentiary hearing. See *Laws* v. *Lamarque*, 351 F.3d 919, 922-923 (9th Cir. 2003). Such hearings, which take place after the AEDPA clock has expired, add delay of the sort Congress sought to remove.

Equitable tolling also undermines Congress's intent to protect the States' "well-recognized interest in the finality of state court judgments." *Duncan*, 533 U.S. at 179. "Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). Equitable tolling not only prolongs uncertainty concerning the finality of state court

judgments, but it also subjects those judgments to greater risk of unwarranted reversal. The longer collateral review lasts, the greater the risk that "[p]assage of time, erosion of memory, and dispersion of witnesses" will preclude retrial and "reward the accused with complete freedom from prosecution." *Engle* v. *Isaac*, 456 U.S. 107, 127-128 (1982); see also *David*, 318 F.3d at 347 ("There is a strong public interest in the prompt assertion of habeas claims. Normally, the grant of habeas relief leaves the state free to retry the petitioner, but this becomes increasingly hard to do as memories fade, evidence disperses and witnesses disappear.").

Finally, equitable tolling has predictably yielded a great deal of side litigation, thereby taxing the resources of the States. Approximately 20% of the federal habeas petitions filed by state prisoners are dismissed as time-barred under 28 U.S.C. 2244(d). See Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1215 (6th ed. 2009). When these untimely petitioners assert an entitlement to equitable tolling, they impose a burden on the States against whom they litigate, and on the federal courts that must resolve their fact-specific claims. To take one rough statistic, a January 29, 2010 search of the Westlaw DCT database for [AEDPA & "equitable tolling"] returned 8820 documents, while the same query yielded 1138 documents from the Westlaw CTA database. Even after the AEDPA clock has run out, petitioners use equitable tolling to fight about their time having ended, at great expense to the States.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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